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PURPOSE

The purpose of this Association shall be to bring into close contact by association and communication lawyers, barristers and solicitors who are residents of the United States of America, or any of its possessions, or of the Dominion of Canada, or of the Republic of Cuba, or of the Republic of Mexico, who are actively engaged wholly or in part in practice of that branch of the law pertaining to the business of insurance in any of its branches, and to Insurance Companies; for the purpose of becoming more efficient in that particular branch of the legal profession, and to better protect and promote the interests of Insurance Companies authorized to do business in the United States or Dominion of Canada or in the Republic of Cuba, or in the Republic of Mexico; to encourage cordial intercourse among such lawyers, barristers and solicitors, and between them and Insurance Companies generally.

President's Page

Annual Meeting Postponed

AFTER careful and thorough consideration the Executive Committee and your President have decided that the Annual Meeting scheduled for White Sulphur Springs for August 30, will have to be postponed indefinitely. Your President and the members of the Committee were very reluctant to make any change in the original plans for the Convention at the Greenbrier. However, conditions have forced themselves upon us to the point that we have had to make this decision regardless of our individual and collective disappointments.

The Greenbrier Hotel is now occupied by enemy aliens and is consequently in the Government service. The management of the hotel indicates that the aliens are supposed to be removed by August 15. About this there can be no certainty. The uncertainty of our being able to meet there as usual is quite apparent.

Your President has had correspondence with the office of Hon. Joseph Eastman, Co-Ordinator of Transportation, even before his recent public announcement, and in this correspondence it has been made quite clear that the Government is opposed to conventions being held where they do not tie in directly with the war effort. The Government's suggestion, therefore, was that the Convention be postponed.

Transportation would be a *sina que non* to the holding of a successful convention. Of such we have no assurance either by rail, bus or private car. The indications are quite to the con-

trary. Your President has had correspondence with the C. & O. Railway, which operates into White Sulphur, without sufficient satisfaction to justify a belief that we could plan, or secure in advance, the use of transportation facilities.

The story of rubber and gasoline has been told and is being retold with disappointment and chagrin every day. To needlessly use either of those articles so vital now to our life and liberty would seem other than patriotic. I am unwilling to have the Association insist on such a right.

Our Conventions heretofore have been of the highest order, and that order should be maintained whenever one is held. Indications are that even if held the Convention would have slight attendance. In recent weeks that has been the experience of other groups. Many other associations are postponing or cancelling their meetings, and I am confident that under the circumstances, grievous as they are, we are making no mistake.

If within the next thirty or sixty days conditions are improved to such an extent that your President and the Executive Committee feel that a Convention can be successfully held, we will forthwith arrange such a meeting and notify the membership. In the meantime, let us all rededicate ourselves to the National service in the trying days that are just ahead. As individuals and as lawyers we shall find ample work awaiting our energies.

We expect to maintain the Journal and the other functions of the Association intact, and I trust that every member will respond when called upon to perform any service for the Association.

WILLIS SMITH,
President.

Citizenship and the Bill of Rights in War Time

By Willis Smith
Raleigh, North Carolina

TODAY we are faced with the greatest danger that this American civilization of ours has ever known. There have been dark days before when brother fought against brother and destroyed common properties, heritages and accummulations of American liberty.

We have now a world-wide conflagration in which the treasures of the past are being burned and every civilized man's life made insecure. The present strife involves principles—economically, religiously and racially—the clash of color and the babble of many tongues. Upon the outcome depends not merely whether American men and women shall live the kind of lives that they have lived heretofore, but whether or not they will want to live, if to live means servitude.

Shall America, the British Empire, Canada, and other national groups in both hemispheres be ever again able to pursue their own free will? Shall American men be the slaves of a foreign foe? Shall American women be the servants and the objects of barter and sale?

These questions may be answered in the way that we would have them answered, but only if we as a people are able to achieve on the field of battle. Then only may we hope for a continuation of the blessings and benefits of American citizenship.

What is this American citizenship of which we have been the proud possessor, and for which those from many lands have come to our shores to have placed upon their breasts the badge of this distinction.

Citizenship is the relation of a person to his government—the status of one who owes allegiance to the government under which he was born, or to which he has been attached of his own volition, and to which he pledges his allegiance in exchange for political rights and privileges. Indeed, citizenship has been the label designating a man's position in a nation. Citizenship has been something to be proud of, where the nation was strong and great and good.

We remember the glorious and dramatic manner in which St. Paul proclaimed to the Centurion that he was a Roman citizen, and that the Centurion said to the Chief Captain: "Take heed what thou doest. For this man is a Roman." To St. Paul Roman citizenship meant something.

We remember the ringing words of Theodore Roosevelt through his Secretary of State, John Hay, when he thrilled Americans by his famous demand: "Produce Perdicaris alive or Raisuli dead." Perdicaris was an American citizen. The might and power of the American Government was to protect him, and protected he was. Protection such as St. Paul and Perdicaris received because of their citizenship has meant much to American citizens in less tragic and serious circumstances. The every day glory of American life has come to us because of the citizenship which has been the heritage of Americans.

The English speaking peoples today are saddened by the many affronts our citizens have recently endured, the insults, jibes, slappings and whippings and strippings of men and women by our foe, the Japs of treachery and debauchery. Today I am confident that every American worth the citizenship which is their heritage will look forward with satisfaction and realization to the day when the Stars and Stripes will go back aloft over the ramparts from which they have been removed.

The Meaning of American Citizenship

Citizenship has meant to Americans the enjoyment of privileges, the protection of rights, and the performance of duties. Citizenship has meant for us living free in a land of bounty; of working as we wished; enjoying the fruits of our own efforts and having and maintaining a home. It has meant dealing with those of our own choosing; spending our earnings as we wished. Citizenship has meant wearing the clothes and costumes that we preferred, regardless of taste, beauty or volume. It has meant the right to marry according to choice, and to live together or apart. It has meant schooling and entertainment for their children, and the right to eat and drink and be merry or sad as the spirit prompted; it has meant the freedom of traveling as inclination prompted and purse made possible. It has meant the right of belonging to organizations of one kind or another; it has meant

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the right to speak and act without suppression.

American citizenship has meant the right to have a fair and open trial by a jury of peers and without self-incrimination. Indeed it has meant the right to criticize the Government so long as such criticism did not mean aiding the enemy. It has meant to every American the right to listen, hear and read, and to make up his own mind as God and Nature had given him the ability. It has meant the right to be safe and secure in his home from unwarranted searches and seizures; to bear arms; to assemble peacefully with other citizens, to petition his Government without fear of any secret police, and above all to hold high his head in the realization that as an American citizen he was the recipient of the utmost of God's bounty. Truly, American citizenship has meant the highest standard of living ever approached by human beings.

Duties of American Citizenship

And with these glorious rights and privileges we must gladly glance at the duties of such citizenship. They have been to labor and live a life of usefulness, as a citizen in his own community; the support of his Government and its institutions, whether in the quiet peacefulness of a period of plenty and progress, or in an era of strife and strain; they have meant the obligation to preserve morale and to preserve his own and his neighbors' liberty; they have meant honesty and faithfulness in his relations to his Government; his willingness in time of peace to prepare for war against the evil day. They mean, if necessary, the sacrifice of himself and his wealth for the Nation's preservation. Above all, they mean a respect and loyalty to the flag, which floats as a symbol of the liberties of a people striving to preserve a civilization contributed to by races, creeds, religions, classes and languages of those who came to American shores for a fuller freedom and a more fruitful life. These are the duties of citizenship.

These rights, privileges and duties, while guaranteed by the Constitution and the Bill of Rights, are not absolute, and should not be so, but rather relative as they must be if we are to protect those rights and privileges and perform those duties. During periods of emergency, stress and war, these rights and duties of citizenship are differently affected. When war arises, then indeed arises another rule to be applied to these rights and duties in order that a citizen's true relationship to his Government may ever be preserved.

Rights of Citizenship During War Time

This rule proclaimed by the Supreme Court of the United States has been called a rule of reason and involves *the test of clear and present danger* as set forth in *Schenck v. United States,* 249 U. S. 47. Schenck, an official of the Socialist party, distributed pamphlets which it was contended might dissuade soldiers from obeying military orders, was convicted of violating the Espionage Act of 1917, and contended that the act offended against the free speech guaranteed by the Constitution. The Court upholding the conviction with Justice Holmes writing the opinion, said:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive ends that Congress has a right to prevent. It is a question of proximity and degree."

Those two great liberals of the Court, Justice Holmes and Justice Brandeis, subscribed to that rule that freedom of speech is not an absolute right that can disregard the place or the hour of utterance. Said Justice Brandeis in another case, *Whitney v. California,* 274 U. S. 357:

> "Only an emergency can justify supression. . . . It is therefore always open to

> Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it."

These rights which the Court was so careful in guarding were guaranteed by the Constitution. Some statesmen said that these rights were provided for by the Constitution in the main body thereof. There were more timorous souls, both within and without the Convention, who remembered more vividly than others the lessons of history. And so, there were appended to the Constitution the first ten amendments known ever since as the Bill of Rights.

The idea of a Bill of Rights to protect the citizen from the whims and caprice of a despotic monarch was an old one. Those statesmen of that era had in their minds not only the Magna Charter of King John, but also the Bill of Rights of 1628 of the time of King Charles I, and the Declaration of Right of 1689 in the days of William and Mary. Those documents have truly been called the "Muniments of English liberties." Those men insisting upon a Bill of Rights were afraid of a too powerful Congress, remembering all the while their then recent experience with an omnipotent Parliament in England.

The view of Hamilton was that there need be no separate Bill of Rights in the Constitution; that in their origin Bills of Rights were stipulations between a king and his subjects, and that such was not needed in the American Constitution because all power resided in the people, except such as was granted by them to their Government. Said he in the Federalist:

> "For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?"

But Hamilton overlooked the tendency of executives in all ages to assume power not expressly given them. Even the Courts have been accused of such usurpation, and sometimes almost found guilty.

And so, in the framework of our Government we have these ten amendments, whose adoption was insisted upon by the colonists of North Carolina before our forefathers cast their lot with the Union.

What the Bill of Rights Protects

Let us consider for a moment what this Bill of Rights protects, and then whether or not the same protection is or should be afforded in wartime as in peacetime. The Bill of Rights provides—

For freedom in religion and against an established church; for freedom of speech and of the press; for the right of the people peaceably to assemble and to petition the Government for redress of grievances; for the right of the people to keep and bear arms; that soldiers shall not be quartered in any house in peacetime without the consent of the owner, nor in wartime except in a manner prescribed by law; that the people shall be secure in their persons, houses, papers and effects and against unreasonable searches and seizures except where warrants shall issue upon probable cause. It requires a presentment or indictment of the grand jury in capital or infamous crimes, *except in connection with crimes arising in the military forces in time of war;* against double jeopardy; against self incrimination, or being "deprived of life, liberty or property without due process of law, and that private property shall not be taken for public use without just compensation."

The Bill of Rights further provides for speedy and public trials by an impartial jury and for the rights of an accused to have the benefit of compulsory process to obtain the attendance of his witnesses, and to have the assistance of counsel in his defense. It provides the right of trial by jury in civil cases and according to rules of the common law. Excessive bail and fines and cruel and unusual punishments are forbidden. The Ninth Amendment provides "That the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people," and the last and Tenth Amendment provides that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

This last provision was to protect States' Rights. Alas! Maybe we of this generation are smarter than the political philosophers and students of that generation which framed our Constitution and the Bill of Rights. Jefferson and others thought that the Constitution should contain a Bill of Rights in order to restrain the central government, and ever be careful of the rights of the people. He

clearly foresaw what has come about in spite of the care that he took to guard against such an occurrence. I do not mean by this that the Bill of Rights has been abrogated. But I do mean that some of the things against which Jefferson wished to guard have come to pass. And so these rights are ours as citizens of America. Some of us may think that the safeguards of the Bill of Rights were not needed; others that they were absolutely essential to our liberties.

But in spite of the desirable features of a Bill of Rights, there soon came to the young American nation the realization that such rights could not be absolute and that above all desire for unlimited liberty there must be the higher duty of the Nation to protect itself from enemies within, even though they might wear the habiliments of citizenship, and ostensibly be entitled to full protection under the Constitution. "Fifth Column" is but a new description of an old human agency. Quislings are nothing new in history so far as substance is concerned. It does seem, though, that the sound of that name goes exactly with what it attempts to describe, as the remark of the city dweller, who when shown and told that the animal he was looking at was a "hog" said: "The name certainly suits the animal."

Wartime Tests Under the Bill of Rights

The Sedition Act of 1798 caused a great deal of argument and discussion, but no great decision. Some cases arose during the period of the War Between the States and immediately thereafter, when the Supreme Court was called on to decide important questions involving the question of the protection afforded by the Bill of Rights to citizens during war time.

One of the outstanding cases was *Ex Parte Milligan,* 4 Wall 2., 18 L. ed. 281, decided in 1866. Milligan was tried in Indiana by a military commission on the charge of treason and sentenced to death. The offense was conspiracy against the United States; aiding a rebellion against authorities of the United States; inciting of insurrection; disloyal practices; and violation of the laws of war.

Milligan challenged the jurisdiction and authority of the commission. He contended that it was not created by an act of Congress and that Congress could not authorize such a trial by military authorities in a section or state that was not actually a theater of war, in contravention of the Bill of Rights. He petitioned for a writ of habeas corpus. The Court held he was entitled to discharge since trial by military commission was not and could not be authorized by Congress, and referring to the protection afforded by the Bill of Rights said:

> "Time has proven the discernment of our ancestors. . . . Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."

This idea expressed by Chief Justice Chase in a minority opinion is later reflected by the Court in the opinion by Justice Holmes in the *Schenck case.* Then came the McCardle case—*Exparte McCardle,* 6 Wall. 318; 18 L.ed. 816. McCardle, an editor in Mississippi, was held under arrest by a military tribunal. He petitioned for writ of habeas corpus to the Federal Court, which refused to release him. An appeal went to the Supreme Court, and while pending Congress passed an act taking from the Court jurisdiction over this type of case. Thereupon President Johnson vetoed the act and Congress repassed it over his veto. The Court held it had jurisdiction, but no final decision was ever had. There were other cases involving contentions about the protection of the Bill of Rights, but these were not finally passed upon by the Supreme Court, and consequently the enactments of the Reconstruction period did not result in legal landmarks. There have, of course, been many cases involving the Bill of Rights, but I am considering now only cases arising in connection with a wartime situation.

Then came the first World War, and the hysteria that necessitated liberal use of the pardoning power by two Presidents, Harding and Coolidge to relieve citizens because of lack of heed to the Bill of Rights. President Wilson at the beginning of the war, being

both an historian and a student of human nature, foresaw the fate of civil liberties. He predicted that freedom of speech and press would pass regardless of the provisions of the Constitution and the Bill of Rights.

Then, as now, fears of sabotage and espionage inspired various bills in Congress and of these came the Espionage Act of 1917, which is still the law. There were convictions of Berger, Debs,"Big Bill" Haywood and others. From this Act were deleted censorship provisions which had been vigorously fought by the press of the country.

With the progress of the war, and the growing impatience of the people, interest in civil rights declined, and in May, 1918, President Wilson approved a severe Sedition Act. The law proscribed statements about and interference with the armed forces; obstruction to sale of Government bonds; abuse of the Government; abuse of the flag or armed forces; obstructing enlisting; displaying an enemy flag; interference with production for conduct of the war; opposing the cause of the United States; inciting disobedience in the military forces, and others.

Prosecutions became numerous and the head of the War Emergency Division of the Department of Justice, John Lord O'Brian, said truly with regard to that act, that the difficulty with the measure was that it covered all degrees of conduct and speech, serious and trifling alike, and, in the popular mind, gave the dignity of treason to what were often neighborhood quarrels or bar-room brawls. The Department of Justice warned against the use of the act to suppress honest, legitimate criticism of the administration or discussions of Government policies.

In spite of such warnings, United States Attorneys showed zeal to indict and it was found necessary to require all proposed indictments to be first referred to the Department of Justice. The Postmaster General barred various publications from the mails, some of which undoubtedly should have been so barred.

The difficulty about observing the "clear and present danger" doctrine in the Schenck case, is that in times of great stress when the institutions of Government are threatened, it is likely that neither the individuals comprising the courts, nor the officers prosecuting in those courts, nor the military authorities in control of a particular locality, can take the time or will have the patience to sufficiently analyze a situation to determine when there is or is not a "clear and present danger" that justifies or fails to justify drastic action. Undoubtedly in this wartime as in others in the past, injustice will be done to the civil liberties of citizens, and some of those injustices will probably have to await redress until the period of war has passed.

It is important that public officials, the Courts, and we as lawyers, should be ever careful not to unnecessarily indict, arrest and bring to trial persons involved in trifling affairs. We as lawyers should be ever ready to devote out attention in aiding the Government and the Attorney General and the District Attorneys to the end that while protecting civil rights, we will not allow ourselves to be improperly used.

We are fortunate in having in our midst the protecting power of the Federal Bureau of Investigation. I am confident that the Bureau will guard the civil rights of honest citizens.

World War Cases

Two of the interesting cases that came before the Supreme Court of the United States, growing out of the Espionage Act of 1917, was *Frohwerk v. U. S.* 249 U. S. 204; 63 L.Ed. 561, and *Debs v. U. S.* 249 U. S. 211; 63 L.Ed. 566.

In both of these cases the opinion was written by that great humanitarian and liberal, Mr. Justice Holmes. The Court in each of these cases brushed aside the contentions that the statute under which they were convicted was unconstitutional and was interfering with free speech, and reaffirmed the doctrine laid down in *Schenck v. U. S., supra.*

In the Frohwerk opinion, Mr. Justice Holmes said: *"We do not lose our right to condemn either measures or men because the country is at war."*

Following shortly after the Debs case was that of *Abrams v. U. S.* 250 U. S. 616; 63 L. ed. 1173, where the Court held that the constitutional freedom of the press was not infringed upon by the Espionage Act of 1917.

In that case in his dissenting opinion Mr. Justice Holmes said, referring to the power of the United States to constitutionally "punish speech that produces or is intended to produce a clear and imminent danger," that "the power undoubtedly is greater in time of war than in time of peace because war opens dangers that do not exist at other times," and also that "Congress certainly

cannot forbid all effort to change the mind of the country."

The Present Situation

In our present emergency there can be no doubt but that both the Military and the Courts must be clothed with ample authority to act promptly and decisively in dealing with efforts that may be made to interfere with the successful prosecution of the war. Without a successful conclusion certainly our Bill of Rights would mean nothing to any citizen, because domination of this country by our enemies would allow for no constitutional guarantees. We have with us restrictions of all kinds, under the authorities of the war powers acts. Even ladies must be satisfied with hair pins not more than two inches long and with only ninty-nine in a package. We must be prepared to sacrifice our appetites for sugar, coffee, alcohol, rubber and gasoline. We have price ceilings that probably are not palatable to those in our midst who would prefer to take advantage of the situation to reap a rich harvest of profits. It may or may not be that some of the rights that we have regarded as heretofore protected by the Constitution and Bill of Rights will be to some extent affected, but again we must remember the "clear and present danger" that we have.

In such a period of emergency we should not quibble too much about trifling infringements of rights when it is the freedom and liberty of the nation that is at stake. Yet as history has repeatedly shown, in such times as these, we will have the curse of petty officials who will attempt to enforce ridiculous ideas. Only the other day a public official who never before had held public office was entrusted with a part in the rationing of gasoline. He was apparently so impressed by the importance of his position that he immediately began lecturing the people. In his wisdom he said "The rationing program is not to reduce essential motoring, but to break up the use of gasoline in motor cars for *the transportation of ladies to teas and bridge parties.* His religious belief against tea and cards seemed to be asserting itself.

Against such we as lawyers should take a firm stand to protect citizens in their civil rights. We should not have to fear that the really responsible heads of our Government will insist upon petty prosecutions, but will have to guard against the small fry who may have a mind for just such prosecutions.

Already we have had some interesting cases to develop. In *Gorin v. U. S., 111 Fed. 2d, 712,* the Circuit Court of Appeals affirmed the judgment of conviction against two men for traffic in information of the Navy Intelligence Service. This involved a Japanese Agent on the West Coast. The judgment of conviction was affirmed by the Supreme Court. In this case the constitutional right of a citizen was raised, since one of the parties was a naturalized citizen of this country.

In the recent McCord case the defendant had voluntarily enlisted in the army. He then joined a religious group and asked for a discharge, saying that his military service and duties, particularly saluting the flag and superior officers, interferred with his religious beliefs. The Circuit Court very properly said:

> "Uniquely essential to successful military operation, 'no question can be left open as to the right to command in the officer, or the duty of obedience in the soldier.'
>
> "Military regulations requiring a soldier to salute his superior officers and his flag are not intended to interfere with religious liberties, and the enforcement of the regulations by a proper military tribunal does not violate the Constitution of the United States."

Recently a case came before the District Court in the State of Washington, *In re: Ventura,* decided April 15, 1942, in which an American born citizen of Japanese ancestry alleged that she was lawlessly restrained of liberty by orders of the commanding officers of the military defense area issued pursuant to Executive Proclamation. She didn't like the military restrictions and said she was "loyal and devoted to the Constitution, laws, institutions and customs of her country", and that she had no dual citizenship and no allegiance to any other country. The Court's opinion, distinguishing the Milligan case, aptly said:

> "The United States is at war— a war such as this nation and this world has never seen before. We are in a recently declared Military Area. . . .To strain some technical right of petitioning wife to defeat the military needs in this vital area during this extraordinary time could mean perhaps that the constitution, laws, institu-

tions of this country to which her petition alleges she is loyal and devoted would be for a time destroyed here on Puget Sound by an invading army.

"In the Civil war when Milligan was tried by military commission no invasion could have been expected into Indiana except after much prior notice and weary weeks of slow and tedious gains by a slowly advancing army. . . . The orders and commands of our President and the military forces, as well as the laws of Congress, must, if we secure that victory that this country intends to win, be made and applied with the realistic regard for the speed and hazards of lightning war."

Another recent case involves the question of relation between client and attorney and the violation of law. In *U. S. v. Offutt,* decision of April 13, 1942, there was before the United States Court of Appeals for the District of Columbia the question of the sufficiency of an indictment of registrant, a conniving draft dodger, and a lawyer, charging an attempt to break the law with respect to the selective service system. The Court held that there was sufficient statement of overt acts to justify the indictment of the registrant and his attorney. However, the Court evidently bearing in mind the overzealousness that arose during the last war, warned:

"True, the facts of this case have not been developed, so strictly speaking, our only concern is with the sufficiency of the indictment, but in the interests of a free people, preserving the dignity of the individual as much as possible while organizing our nation's forces to battle in that behalf, we make it our concern to flash a signal of warning."

Conclusion

From the above we must necessarily conclude that the Government is entitled to exercise prompt and definite restraints where the interests of the people generally are concerned, and that we as members of a great profession are yet citizens who owe a solemn duty to our Government. We must not be too hasty to assist over-weening clients who, while attempting to act under the guise of being entitled to protection of the Bill of Rights, have in their minds protecting some selfish interest or aiding some foreign foe. We must remember that the Bill of Rights as a part of the framework of our Government can be effective only so long as we are able to maintain that Government.

In challenging unwarranted interference with civil liberties, let us remember to do so with an eye single, not only to protect our client's civil liberties, but to make certain that we will do nothing that can in any way aid the enemy or disloyal citizens.

Can the Government conduct a war on a worldwide front and at the same time counter criticism of those things which a citizen should have a right to criticize? The Government did that in the War Between the States. It was demonstrated then that sometimes criticism when given in the proper light and with the proper language, prompted officials to better administration and greater accomplishment.

There can be no doubt but that there is a "clear and present danger" with us at this time. The sinking of our ships along our coasts is sufficient to ever remind us of that danger. However, let our officials remember that in their alertness to prosecute the war that they should not unnecessarily punish the good American Citizen with deprivation of any more of his civil liberties and rights than is absolutely necessary. Let us be certain to do our best, and in fact give our all if necessary, against the common enemy.

Let us hope that as long as there is a real emergency, every American citizen will stand ready and willing to do his part and to forego if necessary his civil rights in order that the Nation may prevail in the present conflict.

At the same time, as citizens and lawyers, let us hope that there will will be no unfair stifling, but rather encouragement of the honest ingenuity and initiative of American business men and that the traditional American way of life and liberty may always be protected.

Where Surety's Cause of Action on Indemnity Agreement Arises After Distribution of Deceased Indemnitor's Estate, Lien Can Be Impressed on Distributed Property

By Byrne A. Bowman
Oklahoma City

PROTRACTED litigation on a bond claim frequently results in payment by the bonding company after the principal has died and his estate has been distributed. Opportunities for salvage still exist, however, for an action can be maintained on the usual indemnity agreement, to impress an equitable lien on the property distributed.

A cause of action does not arise on an indemnity agreement until the indemnitee has actually suffered the loss indemnified against. *New England Equitable Ins. Co v. Boldrick* (*Iowa*) 185 N. W. 468; 31 C. J. 437, Sec. 32. 6., a; 31 C. J. 439, Sec. 35 c (1). Thus the bonding company never has a cause of action on the agreement until it suffers a loss.

Most probate statutes providing for filing of claims of creditors clearly contemplate an existing claim of definite amount, which might not be due or might be contingent. Obviously, there is no intention that these statutes should cover the continuing unbroken obligation of an estate on a bond, covenant of warranty in a deed, or obligation in an indemnity agreement. When, if ever, there will be a breach, is unknown. The amount of loss, if any, is unknown. Claim could not be filed for any definite amount. Suit could not be brought for any definite amount on a rejected claim. The probate court would have no criterion for determining the amount to be held up. The court would not be warranted in holding up distribution indefinitely.

In *Pruett v. Caddigan* (Nev.) 176 P. 787, a new guardian brought suit against executor of deceased surety of former guardian for amount of surcharge laid against former guardian. The surety had died and time for filing claims against his estate had expired prior to the time former guardian's account was settled. This was pleaded as a defense, to which demurrer was sustained. Affirmed. The appellate court said:

"If the bond in question is such a claim as must be filed against the estate of the deceased surety before actual default of the principal, it could only be of the penalty of the bond, $2,500; nothing more definite and nothing less in amount. In this situation, the sum of $2,500, the principal of the bond, would necessarily have to be subtracted from the total assets of the estate of O'Keefe and paid into court to await the happening of the contingency upon which it rests for payment. The Legislature certainly could not have intended, by making provision for the protection of contingent claims, that the assets of an estate be tied up to await indefinitely the happening of an event that may never happen. *McDowell v. Brantley*, supra. If such result is intended, it clearly defeats one of the purposes of the non-claim statute, namely, the speedy settlement of estates. . . .

"We are of the opinion that a subsisting, outstanding, unbroken obligation, such as a guardian's bond, is not the sort of contingent claim referred to in Section 6057, Rev. Laws."

In *Bancroft Practice* (1928) Vol. III, Sec. 772, p. 1382, the foregoing Nevada case is discussed:

"The primary distinction thus raised by the Nevada court is between claims, which though contingent, can be foreseen as existing, and claims which cannot in the exercise of due diligence be foreseen. The former, although contingent, should be presented, but the latter are not within the intendment of the statute. This distinction appears to be sound. A claim, the existence of which cannot be foreseen within the period for presentment, is something more than 'contingent'."

In *Mann v. Everts* (Wisconsin, 1885) 25 N. W. 209, the court held that action against heirs of deceased surety on administrator's bond was not barred because of failure to file claim with administrator of deceased surety's

estate within time allowed, the surcharge on the bond not having been laid until ten years after said time had expired. It was contended that a contingent claim should have been filed. The statute provided for filing of contingent claims. After considering the provisions of the statute, the court said:

> "We do not think they were intended to or do apply to a contingent claim like the present, which did not accrue and was incapable of being established by proof until years after the estate of Everts had been fully administered. The breach of the bond did not occur until (1883) nearly 10 years after that time. The very existence of any future liability of that estate was uncertain, depending upon the contingency of Maurice Fitzgerald's performing the condition of his bond. If he should faithfully perform that condition the Evert's estate would have to answer for no breach. But if the administrator failed to perform, what damages would result from the breach, and how could they be ascertained? Suppose the breach were one which would furnish a claim for nominal damages only, or for a portion of the penal sum. It is not apparent in 1873 it was utterly impossible for the Fitzgerald heirs to prove any contingent liability or claim against the Everts estate? According to our view, the statute refers to a contingent claim or liability which can be established by proof, and the amount ascertained. . . . All that can be said in this case is that in 1873 there was an outstanding unbroken bond. . . . Such an obligation cannot be considered as a debt, either *in praesenti* or *in futuro*. It may, in case of a breach, be the foundation of a debt or liability, but a claim arising from it in the nature of a debt will arise from the breach and not from the mere existence of the obligation."

In *Bullard v. Moor* (Mass.) 33 N. E. 928, action was brought against distributees of estate, to charge them on indemnity agreement executed by deceased, indemnifying plaintiff from loss in a suit. Loss was paid after estate had been fully administered. Defense was that no claim was filed. Statute as amended, provided that if it appeared "that such claim is, or may become, justly due," the court is to order assets to be retained. The words "or may become" were inserted by amendment. The court held action not barred:

> "But the statute must be construed reasonably. It cannot have been intended to enable anyone who has an outstanding contract, made by a deceased person, to suspend the settlement of the estate indefinitely, without regard to the probability of anything becoming due on the contract, and when it still is impossible for the probate court to form any estimate of what amount should be retained as 'sufficient to satisfy the same,' in the words of the statute. The meaning of the word 'creditor' retained from the General statutes, has not been changed so far as that. Furthermore, although we do not rely on this circumstance as sufficient in itself, if the plaintiff might have applied to the probate court, still at the earliest date when he had the slightest reason for doing so, his claim could not have been provided for in full; and the amount to be reserved, if any, was a pure matter of speculation, and remained so until the estate was fully administered. . . . We are of the opinion that the plaintiff was not barred of his present proceeding by his failure to apply under section 13 . . ."

In *Hantzch v. Massolt* (Minn.), 63 N. W. 1069, ward became of age August 3, 1891, and petitioned probate court to compel his guardian to account. Account settled, surcharge being laid against guardian, on December 4, 1893, but appeal taken. Surcharge affirmed March 3, 1894. In the meantime both sureties on the guardian's bond had died, time for filing claims with their representatives had expired, and the estates had been distributed. Claims in the first estate had to be presented by December 30, 1890; in the second, by the first Monday in October, 1892. First estate was distributed January 25, 1894; the second, September 2, 1893.

Ward brought suit against distributees of the estates on his claim of surcharge indebtedness of former guardian, not exceeding the value of the property received by them. Defense was that claim not presented against estates, therefore barred. This point raised by demurrer. Sustained. Reversed on appeal.

The court said:

> "The plaintiff's claim did not become absolute and liquidated until long after the time for presenting claims against the estates of the deceased sureties, or either of them, had expired, and the estates settled

and distributed to the defendants as heirs and devisees. Is this action then barred because the plaintiff did not present the claim to the probate court for allowance?"

After quoting from the statutes, the court stated that the statute ought to be construed in a manner to afford every creditor an adequate remedy to secure payment of his claim out of the property. The court pointed out that the statute makes no provision for the payment of claims which are still contingent when the period of time limited by the statute expires, and makes no provision for retaining in the control of the court funds to pay them in the future, in case they become absolute, or for suspending the settlement of the estate, until that even occurs, if ever. The court then said:

"It is not to be presumed that the authors of the statute intended to provide for the proof of claims against a decedent's estate, and bar all subsequent action thereon if they were not so proved, and provide no possible way for their payment. It would have been impracticable to have attempted to provide for the future payment of claims which were contingent and unliquidated when the time for allowing claims expired, for it would be impossible to determine how much it would be necessary to retain from the funds and property of the estate to pay such claims in the future, and equally impracticable to have provided for a suspension of the settlement of the estate and the distribution of the residue until it was determined whether such claims were absolute or not. It is manifest that the omission from the Probate Code of all provisions for the payment of this class of claims was intended, because it was wholly impracticable to make any provision for them. But concede that the probate court has the inherent power to retain in court the amount of an unliquidated contingent claim; how much must be retained? How would it be possible to determine the matter? Or, if the settlement of the estate is to be continued until the claim can be determined, then for how long a time? If this can be done, then the covenantee of the deceased party in a warranty deed may suspend the settlement of the estate indefinitely, without regard to the probability of anything ever becoming due on the covenant. Sec. 104 must be given a reasonable, and not a literal construction, which as we have seen, would lead to absurd and unjust results . . . The manifest meaning of Sec. 104, when read with reference to the settled law and practice of the state before its passage, and in connection with all the other provisions of the statute to which we have referred, and in view of the practical impossibility of providing for claims which are contingent and unliquidated when the time for proving claims expires, is that such claims are not barred if not presented to the probate court. This section means that all contingent claims which become absolute and capable of liquidation, whether due or not before the expiration of the time limited for proving claims, must be so presented, or they are barred; but that all contingent claims may be presented to the probate court with a statement of the particular of such claims, and those which become absolute and capable of liquidation within the time limited for proving claims are to be allowed and paid as other claims, but those that do not thus become absolute cannot be allowed or paid, and the settlement of the estate proceeds as if they had never been filed. When such claims become absolute, if ever, an action to recover the amount thereof from the heirs, legatees, and distributees of the decedent, under Chapter 77, Gen. St. 1878, is not barred. The plaintiff's claim falls within this class."

The court held that whether there would ever be anything due from the sureties depended upon the result of the settlement of his accounts and that the claim did not become absolute and liquidated until that time.

In *Martz v. McMahon* (Minn.), 129 N. W. 1049, administrator had money in his hands at time of final decree. Decree stated that money should be paid to deceased's daughter when her mother died. Surety on administrator's bond died and his estate closed. Daughter sues surety's administrator for the amount of money. Defense is that no contingent claim filed. Held there never was a breach. Not barred.

"Until such trustee was appointed there was no breach of John S. McMahon's bond, and there was no claim contingent, or otherwise, which the infant Matz could have filed. There was no demand or claim which could have been charged against his estate . . . "

In *Nathan v. Freeman* (Montana) 225 Pac. 1015, lessor brought suit against lessee's executor for damages for breach of contract whereby lessee had agreed to replace floor and front of building upon termination of lease, and whereby lessee had agreed to pay any increase in taxes occasioned by his construction of an addition to the building. Lease was terminated and breaches occurred during administration and after time for filing claims had expired. Lower court held that these claims were barred by statute of non-claim. Reversed. After quoting statutes practically the same as ours, the court said:

"The statutes are plain and unambiguous, but have reference only to the indebtedness of a deceased person, contracted by him in his lifetime, and then existing, whether due, not due, or contingent, excepting mortgage debts (Id. Sec. 10173), and funeral expenses specified as a preferred claim against the estate of a decedent (Id. Sec. 10307). They can have no application to obligations arising subsequent to the death of a person because of existing executory contracts. Obligations, arising by virtue of a contract after the death of the party to be held to performance, by operation of law become those of his personal representative in the fiduciary capacity of the latter. In our opinion these statutes of non-claim have reference to an indebtedness existing at the time of the decedent's death, not to such as arise subsequently by reason of a breach of the executory contracts of the deceased. Claims existing before death are in one category, and those arising subsequently in another. The claims required to be presented by the statute as a condition precedent to the maintenance of an action thereon are existing demands against a decedent at the time of his death. That which has become due on the contract during the lessee's lifetime is of the character of demands which must be presented to the executor within the time fixed by the statute, but as to such as arise subsequently, during the life of the lease contract, the executor alone is liable either personally or in his representative capacity, dependent on the facts. The lease under consideration runs to L. E. Freeman, 'his heirs, executors, administrators and assigns' but whether it did or not is of no consequence, as the law requires that the personal representative of a decedent after his death shall fulfill his executory contracts. The contract continued in force, and was not terminated by the death of the lessee. . . .

"From what we have said as to the law governing it is apparent that the trial court was in error in denying the plaintiff the right to recover of damages for failure to replace the front and floor of the building, and for money expended by him for taxes on the addition to the leased premises. *These several items of liability arose after the death of the lessee, and the defendant Waldo Freeman, as executor, is chargeable therewith in his representative capacity . . .*"

We quote from the opinion on rehearing:

"The word 'claims', as employed in the statute, has reference only to those which existed against the lessee at the time of his death, not to such as subsequenly arose during the administration of his estate. As to any amount of taxes due and unpaid by Mr. Freeman in his lifetime under the contract they clearly would have constituted claims due against his estate in contemplation of the statute, but there was no possible way to estimate the amount of taxes subsequently to be assessed, or basis to assume that such as were levied would not be paid. Such obligations arose during the process of administration of the estate, and so likewise as to the replacement of the floor and the front of the building. In order to create an obligation upon Freeman to pay the cost of replacing the floor or front at all the cost of replacing the floor or front at all (1) the leasehold period must have first terminated, or (2) Freeman must have abandoned the lease before the expiration of the term, or in either event (3) Nathan was required to elect to have them replaced. Until the contractual obligations of the deceased had at least a potential existence, they could not be classed as claims of creditors of the decedent. (Section 10107, Rev. Codes 1921.)"

In *Leavenworth Savings & Trust Co., v. Newman* (Eighth Circuit Court of Appeals, 1937) 23 F. (2) 835, action was brought by mortgage trustee on written guarantee that bonds of corporation would be paid. The trustee had sold the security and there was a deficiency. Stockholders had signed the guarantee on August 21, 1915. One died in 1920 and his estate was closed in 1922. At that time there had been no default on the bonds. Plaintiff had filed a claim, but there was no recovery thereon and he had received nothing

from the heirs. Trial court dismissed case for want of equity. Reversed. The court said:

"Further, in so far as recovery is sought against the heirs of J. F. Drais, who have received distributive shares of his estate, the cause of action arises by virtue of the provisions of the statutes of Missouri which make the descent of both real and personal property subject to the debts of the ancestor . . . Similar statutes exist in many states. Under these statutes it is generally held that the heirs and distributees may be proceeded against directly, where the cause of action did not arise or accrue so as to become provable or enforceable, until after the administration of the estate had been closed. 18 C. J. p. 954, Sec. 308; Rankin v. Herod (C.C.) 140 F. 661; Rankin v. Big Rapids (C.C.A.) 133 F. 670; Hantzch v. Massolt, 61 Minn. 361, 63 N. W. 1069; State ex rel Brouse v. Burns, 129 Mo. App. 474, 107 S. W. 1094; Walker's Adm'r. v. Deaver, 79 Mo. 664, 673; Chitty v. Gillett, 46 Okla. 724, 148 P. 1048, L.R.A. 1916 A, 1181, and note, 1185."

In *Chitty v. Gillett*, 46 Okla. 724, 148 P. 1048, (1915) plaintiff sued heirs to establish lien against properties they inherited, his cause of action being a judgment against administratrix of their intestate. The administratrix could have set aside money to cover the claim and kept the estate open, but had not done so. The estate had been closed and administratrix discharged before the judgment was rendered. Held, plaintiff entitled to maintain suit. First paragraph of syllabus:

"Where a claim against the estate of a deceased person does not accrue or become enforceable until after the administration of the estate has been closed, and all the property has been distributed and passed into the hands of the heirs, its collection may be enforced by a direct action, in the district court, against the heirs of the deceased, and they may be held liable in such an action to the extent of the assets received by them from the estate. And a demurrer to the jurisdiction of the district court in such an action should be overruled."

In discussing the questions, the court said:

" . . . the weight of authority is to the effect that where a claim has not accrued or become enforceable until after the administration of the estate is closed, a recovery may be had in an action against the heirs in the district court, to the extent of the assets received by them from the estate. Some of these decisions are based upon special statutes to that effect, while the reason for this rule in others is based upon statutes similar to our own."

The Court quotes the Oklahoma statute making property of the decedent chargeable with payment of the debts of the deceased, shows that the Arkansas statute is similar and quotes from Arkansas and Kansas cases authorizing such actions when the claims accrue after estates are closed. The court states: "This doctrine is also upheld by the courts of Missouri, Minnesota, Louisiana, Georgia, and several others."

"4. Where surety has been compelled to indemnify obligee of bond after principal's death, its right to reimbursement from distributees of principal's estate is enforceable in equity."

In *Morrison v. Fidelity & Deposit Co. of Maryland (Georgia,* 1920), 102 S. E. 354, the bonding company brought suit on indemnity agreement given by administrator in consideration of company becoming surety on his bond. He had died and his estate had been distributed. Suit was to charge inherited property with the claim which had arisen on the agreement. The first two paragraphs of the syllabus are:

"Where a person dies owing a debt, his creditors may in equity follow assets left by such person in the hands of the distributee and where the assets received by the distributee are sufficient to pay the debt, the creditors may obtain a personal judgment against the distributee for the amount of his debt. *Caldwell v. Montgomery,* 8 Ga. 106, Civ. Code 1910, Sec. 3785.

"In such case the creditor must sue upon his claim within the statutory term applicable to his case against the decedent. *Caldwell v. Montgomery, supra.*"

There is no opinion published in said case, and a statute is apparently involved, but it merely reflects the common law rule.

In *Colonial Trust Co. v. Fidelity & Deposit Co. of Maryland* (Md.) 123 A. 187, surety company became surety on bond to state fiscal agents to save them from any

loss arising from their issuing new negotiable state debt certificates in place of some claimed to be lost. Representative of deceased owner applied for bond and executed indemnity agreement to hold bonding company harmless. Agents then issued certificates to her, which she sold. She died and her estate was distributed. The "lost" certificates were presented for exchange by persons who had acquired them in good faith. The bonding company had to buy for, and deliver to, these persons the bonds said persons were entitled to in said exchange. It then brought suit against the distributees of the estate to compel them to produce the assets they received so that they could be subjected to satisfaction of surety's claim on indemnity agreement. Order overruling demurrer to bill affirmed.

In conclusion, as salvage rights actually exist where the indemnitor has died and his estate has been distributed, it is well to investigate the estate when the loss is paid even though many years have gone by.

BLASTING

By Allan E. Brosmith
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BLASTING is the rending or breaking up of rock or other solid material by the use of high explosives such as gun powder, nitroglycerine and dynamite which when ignited causes a decomposition or combustion of gas with such rapidity that an explosion follows.[1]

Its commonest use is in quarrying stone, excavating, tunnelling and in the clearance of land and because the explosives employed (dynamite being the most commonly used) are inherently dangerous the user becomes engaged in an ultrahazardous activity for the reason that it is impossible to predict with certainty the extent or severity of its consequences.[2]

The liability imposed upon those who carry on ultrahazardous activities is absolute because they have thereby for their own purposes created a risk which is not a usual incident of the ordinary life of the community. If the risk ripens into injury, it is immaterial that it is made effective in harm by the unexpectable action of a human being, an animal or a force of nature. This is so irrespective whether the action of the human being which makes the ultrahazardous activity harmful is innocent, negligent or even reckless.[3]

Illustrative of what has just been said—if quantities of gun powder are used to blast out rock on a lot contiguous to the plaintiff's in a large city, this constitutes an unreasonable, unusual and unnatural use of the property and no care or skill in so doing could excuse the user of the explosive from responsibility to the plaintiff for the damage actually done thereby to his house and it would make no material difference whether the damage or destruction resulting proximately and naturally from the act of blasting was caused by rocks thrown against plaintiff's house or by a concussion of the area around it.[4]

In some jurisdictions the user of dynamite under certain conditions is merely required to use reasonable care.[5] In another, the highest degree of care is required,[6] and in still another jurisdiction the user is held to be an insurer.[7]

Blasting operations are generally considered as constituting or creating a nuisance either public or private and in such an event the defendant need not be proved and in general contributory negligence is no defense, but recovery in such cases could only be defeated by proof of wanton, wilful or reckless misconduct on the part of the plaintiff which materially increased the probability of injury and contributed thereto.[8]

Some courts distinguish between the liability for a common law trespass occasioned by blasting which projects rocks or debris upon the property of another and liability for damage arising from concussion and deny liability for the latter where the blasting

[1] 25 C. J. 181.
[2] Restatement of the Law of Torts, Vol. 3, p. 43.
[3] Restatement of the Law of Torts, Vol. 3, p. 48.
[4] Colton v. Onderdonk, 10 Pac. 395 (Calif.).
[5] 92 A. L. R. 745.
[6] Louden v. Cincinnati, 106 N. E. 970 (Ohio).
[7] Exner v. Sherman Power Constr. Co., 80 A. L. R. 686.
[8] Worth v. Dunn, 118 Atl. 467; Schnitzer v. Excelsior Powder Mfg. Co., 160 S. W. 282; C. W. & T. Coal Co. v. Glass, 34 Ill. 364.

itself was conducted at a lawful time and place and with due care. The distinction is based upon the historical differences between the common law actions of trespass and case.[9]

The majority rule, however, is that there is no practical difference between liability occasioned by blasting which projects rocks on another's property or by creating a sudden vacuum and resultant concussion.[10]

The majority rule follows the principle "sic utere tuo ut alienum non laedas" whereas other courts hold that if there is no actual physical invasion of property rights the injury is "damnum absque injuria" so long as the operations are conducted with due care and without negligence. The annotations on page 741 of Volume 92 of the American Law Reports recite the states in which these two rules are exemplified.

Probably the most quoted case justifying the minority rule is *Booth v. Rome W. & O. T. R. Co.*[11] In this case the Court maintains that if a railroad company is compelled to blast on its own land in order to lay its tracks and exercises due care in doing it, and uses charges of no greater force than are necessary for the purpose, it is not liable for injury to adjoining property arising merely from the incidental jarring. This case has been cited one hundred and seventy-four times.[12]

In denying the right to plaintiff to recover in this case, the Court argued that the rocky surface of the upper part of Manhattan Island (New York City) makes blasting necessary in the work of excavation, and unless permitted, the value of lots, especially for business uses, would be seriously affected. May the man who has first built a store, a warehouse, or dwelling on his lot, and has blasted the rock for a basement or cellar, prevent his neighbor from doing the same thing, when he comes to build on his lot adjoining, on the ground that by so doing his own structure will be injured? Such a rule would enable the first occupant to control the uses of the adjoining property to the serious injury of the owner, and prevent, or tend to prevent, the improvement of property.

Kentucky is another state aligned to the minority rule for there it has been held that there can be no recovery for consequential damage caused by blasting resulting from the concussion of the atmosphere, sound or otherwise, unless it is shown by the plaintiff that the one was done negligently and that the injury was the result of negligence and not the result of blasting done according to the usual methods and with the usual care.[13]

This rule of absolute liability does not seem to apply to municipalities for a Federal Court has decided that it is the well settled rule that a municipality or other political subdivision charged with the duty of laying water mains is not liable in tort for all damages that may be caused by the blasting of rocks necessary in such construction but only for such damages as are caused by carelessness and unskillfulness.[14] This rule on the other hand has been applied to blasting done in a navigable stream under license from the Government by a private organization to supply the public with electricity and clothed with the power of eminent domain.[15] The rule has also been applied in an instance where blasting was done on a river bank to the damage of a railroad.*

INDEPENDENT CONTRACTOR

"Since liability of a person for an invasion of another's interest, caused by ultrahazardous activities, does not depend upon either his intention or his negligence, a person who employs an independent contractor to carry on such an activity is subject to liability for harm that results from its ultrahazardous character to the same extent as if he carried it on himself. The possessor is not, however, liable for harm which does not result from the ultrahazardous nature of the enterprise."[16]

Blasting as you have already seen has been held by this same authority to be an untrahazardous activity. Consequently, if you employ an independent contractor to do whatever blasting may be required upon the premises and exercise due skill and care in his selection and retain no control over the manner in which the blasting is to be done and the blasting is carefully done, you are li-

[9]Legaux v. Feasor, 1 Yeates Pa. 586, 587; Wendt v. Yant Constr. Co., 249 N. W. 599 (Nebr.); Hickey v. McCabe, 75 Atl. 404 (R. I.).

[10]Wendt v. Yant Constr. Co. supra, 11 Ruling Case Law 673; 80 A. L. R. 690; 25 C. J. 193.

[11]35 N. E. 592.

[12]Shepherd's Citations.

[13]Williams v. Codell, 92 A. L. R. 737.

[14]Caramagno v. U. S. 37 Fed. Supp. 741.

[15]Watson v. Mississippi Power Co., 156 N. W. 188.

*Additional citations may be found in Fourth Dec. Digest, Vol. 14, p. 906; 25 C. J. 181.

[16]Restatement of the Law of Torts, Vol. 4, p. 286.

able nevertheless for damage done either by the blasting or the *concussion*.[17]

The Supreme Court of Errors of Connecticut has this to say on the subject:

> "Of the many statements of the rule, to be found in the textbooks and adjudicated cases, perhaps none is clearer than that in a case in our own State in an opinion by Justice Fenn, who said that the operation of blasting with dynamite was intrinsically dangerous and should be so regarded, yet whether under all the facts in the case, the work contracted to be done, in the natural, ordinary and reasonable performance thereof, called for the use of such intrinsically dangerous agency and means as would obviously expose others to danger and injury, was a question for the jury. 'If so, the defendant could not excuse itself from liability for injury so occasioned, by reason of any contract with another to perform the work. It is as sound a rule of law as of morals, that when, in the natural course of things, injurious consequences will arise to another from an act which I cause to be done, unless means are adopted by which such consequences may be prevented, I am bound, so far as it lies within my power, to see to the doing of that which is necessary to prevent the mischief. Failure to do so would be culpable negligence on my part.'"[18]

The discussion of this subject in Corpus Juris inclines to the opposite conclusion and it cites a number of cases tending to support its reasoning.[19] In addition to the authorities it cites, there are other cases maintaining that an action will not lie against one who has employed a competent contractor for injuries caused by rocks or other materials cast up by a blast with relation to persons on or near the highways or persons on adjoining premises, or to property in the neighborhood of the place where the work is being done, or because of injuries caused by runaway horses frightened by the noise of the blast.[20]

STORAGE OF EXPLOSIVES

Dynamite is of the class of elements which one who stores or uses in such a locality or under circumstances as to cause likelihood of risk to others, stores or uses at his peril. He is an insurer and is absolutely liable if damage results to third persons either from the direct impact of rocks thrown out by the explosion (which would be a common law trespass) or from concussion.[21]

The liability in these cases is based not on the illegal storage or upon negligence but upon the theory that the use of dynamite is so dangerous that it ought to be at the owner's risk. There is no difference between the liability, the result of an explosion, whether the dynamite explodes when stored or when employed in blasting.

It has been very generally held that the storage of explosives in large quantities and in proximity to houses and to buildings in general so that injury to persons or property is likely to result therefrom, renders the person storing the explosives absolutely liable for all damages suffered in consequence thereof irrespective of negligence or want of care, the ground of such liability usually being that the storage constitutes a public or private nuisance, and the cases for the most part do not limit recoveries to persons or property within any particular distance from scene of the blast—in one instance the damaged property was one mile distant from the storage place.[22]

Storing of powder and other explosives on the bank of a river down which boats pass frequently, and in the vicinity of railroad tracks, is a public nuisance, entitling anyone injured by explosion thereof to damages without proof of negligence.[23]

It has also been held that the storage of large quantities of explosives on an island constituted a danger to the boats passing to and fro, and consequently was a nuisance.[24]

In a community sparsely settled, however, the storage of explosives of moderate quantity may not imperil life or property in the vicinity, but if located in a more populous neighborhood, it might be found to endanger both. The proximity of the dwellings or highways, or of the usual facilities for public travel, or density of population, determine the question.[25]

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[17]Restatement of the Law of Torts, Vol. 4, p. 287.
[18]Welz v. Manzillo, 155 Atl. 841.
[19]25 Corpus Juris 197.
[20]18 A. L. R. 858.
[21]Exner v. Sherman Powder Constr. Co., 80 A. L. R. 686.
[22]80 A. L. R. 693, 694.
[23]Wilson v. Phoenix Powder Mfg. Co., 21 S. E. 1035.
[24]11 R. C. L. 658.
[25]Flynn v. Butler, 75 N. E. 730.

Some courts, however, have held that the wrongful acts of persons over whom the person storing explosives has no control, and whose acts could not be reasonably anticipated, may excuse the defendant.[26]

As an instance, there is authority to the effect that the negligent storing of dynamite is not the proximate cause of an injury to one who without right uses a building where it is stored as a target for gun practice, thereby exploding the dynamite to his injury.[27]

One complying with a municipal ordinance prescribing regulations for the storing of explosives, is not relieved from liability for failure to comply with the obligation arising under the general rules of law to use such care in the maintenance and management of one's property as would be ordinarily used by a reasonably prudent man similarly placed.[28]

Nevertheless, one must be entitled to the benefit of the statute in order to invoke a civil remedy by reason of such statute.[29]

The absolute liability rule is not applied to railroads because in the absence of negligence on the part of a common carrier it is not liable to third versons injured through its transportation of explosives in the performance of its duty to receive and transport freight of such character. It is, however, liable to those injured through its negligence or whether it has so handled the shipment that it has become a nuisance.[30]

In conclusion, anyone who stores explosives under circumstances rendering him guilty of maintaining a nuisance is liable for all damages resulting from an explosion whether he be charged with negligence or otherwise, consequently, he is bound to take every possible precaution to prevent injury, the only exception being a possible explosion precipitated by an unanticipated natural force or the wrongful acts of persons over whom he has no control and which reasonably could not be anticipated.[31]

As illustrative of this, recovery has been denied for the destruction of houses in the vicinity of gun powder in storage which exploded when struck by lightning.[32]

[26]80 A. L. R. 695.
[27]24 L. R. A. (New Series) 119.
[28]25 C. J. 186.
[29]Exner v. Sherman Power Constr. Co., 80 A. L. R. 686.
[30]25 C. J. 198.
[31]25 C. J. 183.
[32]Tuckochinsky v. Lehigh & W. B. Coal Co., 49 Atl. 308.

ATTRACTIVE NUISANCE—CHILDREN

"A landowner can be held liable for injury to children trespassing upon his land caused by any structure or other artificial condition which he maintains upon the land if the place where the condition is maintained is known to the owner, or should have been known to him, as one that children are likely to trespass, or one where the condition is such that the owner knew or should have known or realized that it involved an unreasonable risk, or death, or serious bodily harm to the children, or because the children on account of their youth would not discover the condition or risk involved in intermeddling in it or coming within an area made dangerous by it, and where the utility to the owner of the land in maintaining the condition is slight compared to the risk to young children involved therein. Therefore, the owner is subject to liability to children who after entering the land are attracted into dangerous intermeddling by such a condition maintained by him although they were ignorant of its existence until after they had entered the land, if he knows or should know that the place is one upon which children are likely to trespass and that the condition is one with which they are likely to meddle."[33]

The principle of law recited in the preceding paragraph is a well recognized exception to the rule of non-liability to infant trespassers, and is the doctrine which is generally termed the "attractive nuisance" or "turntable doctrine." This doctrine is presumed to have originated in an English case in which one who left a horse and cart unattended on the street was held liable for an injury received by a child while playing on the cart. In the United States the doctrine is designated the "turntable doctrine" or the doctrine of the "turntable case" because the leading American case on the subject in which the doctrine was first recognized by the Supreme Court of the United States involved an injury to a child playing around a railroad turntable.[34]

The attractive nuisance doctrine, however, applies only to children of tender years who are too young to appreciate the danger.[35]

This liability for injury to children is im-

[33]Restatement of the Law of Torts, Vol. 2, Sec. 339; Smith v. Smith-Peterson Co., 100 A. L. R. 440; Annotations, p. 461; 11 R. C. L. p. 666. par. 19.
[34]Sioux City, etc. R. R. v. Stout, 21 L. Ed. 745; 45 C. J. 758.
[35]Drew v. Let, 182 N. E. 547; Fourth Dec. Digest, Vol. 24, page 189, Key 39.

posed even though they are technical trespassers where such injuries are the result of the failure of the owner or the one in charge to take proper precautions to prevent injury to children by instrumentalities or conditions which he should, in the exercise of ordinary judgment or prudence, know would attract them into unsuspecting danger.[36]

The duty to protect children from being injured must find its source in special circumstances which by reason of inducement and of the fact that visits of children to the place would naturally be anticipated, and because of the character of the danger to which they would unwittingly be exposed, reasonable prudence would require that precautions be taken for their protection.[37]

The doctrine is applied whether the children are trespassers or invitees. [38] In fact, it has been held that where children are attracted to a place of danger on one's premises they are licensees.[39]

It is likewise true that trespass alone is not sufficient to bar recovery from the landowner for injuries to children going on unguarded premises because of the attractive nuisance.[40] The attraction in order to support an action for a child's injuries must be an unusual thing.[41] And this doctrine is applied only where they would be trespassers except for implied invitation by something thereon which has attracted them.[42] However, there is authority for the statement that the attractive nuisance doctrine must be very cautiously applied.[43]

Of course, infants have no greater right to go upon other people's land than adults but an attractive instrumentality may in reality in law be an invitation to an infant to come upon the land and in such an instance the landlord is required to use the degree of care due an invitee.[44]

In order, however, to make out a case of attractive nuisance it must be shown that the injured child was too young to understand the danger of the nuisance which was the direct and proximate cause of injury.[45]*

[36] 45 C. J. 758.
[37] Noah Best, Adm'r v. District of Col., U. S. Supreme Court Reports, 78 L. Ed. 882.
[38] Central Coal, etc. v. Porter, 289 S. W. 12.
[39] 280 S. W. 12.
[40] Lambert v. Western Pac., etc., 26 Pac. 2d 824.
[41] Windsor, etc. v. Smith, 261 Pac. 872.
[42] Bicondi v. Boise, etc., 44 Pac. 2d 1103.
[43] Burns v. City of Chicago, 169 N. E. 811.
[44] 7 Tenn. App. 555.
[45] 7 Tenn. App. 555.
*For additional cases, see Fourth Dec. Digest, Vol. 24, p. 189.

INJUNCTIVE RELIEF AGAINST BLASTING

The constant casting of rock or debris upon the property of an adjoining owner or the constant jarring of buildings in the vicinity of blasting operations can be prevented or enjoined by injunction where an action at law for remuneration would prove inadequate, cause a multiplicity of suits to recover for each separate tort, or where the injury would prove irreparable. Irreparable injury, however, does not mean that it is beyond the possibility of repair or beyond the possibility of compensation in damages, but it must be of such constant and frequent recurrence that no fair or reasonable redress can be had therefor in a court of law.[46]

When injunctive relief will or will not be granted against a trespass such as has been described, rests upon the facts in the individual case, but it will not be granted as a matter of course.[47] For instance, it will not be granted where an adequate remedy at law exists, or where the damage is trivial, or where the harm is merely anticipated.[48]

The Restatement of the Law of Torts[49] treats of the "relative hardship" as one of the factors to be considered in determining the appropriateness of injunctive relief against a tort, which briefly is this: where injunctive relief is sought, if the seeker will suffer far less hardship than he who is to be enjoined, the remedy will not be granted, whereas if its refusal will incur a greater hardship upon the seeker it may be granted, but this relative "hardship factor" is not the sole criterion in determining whether or not an injunction shall be granted as other factors may enter into the consideration.

Generally, equity will not relieve against naked trespass and in no event unless irreparable damage would result.[50]. Further, equity will not interfere unless the trespass is so aggravated that injury is irreparable and not adequately compensable by law.[51] Equity, on the other hand, will enjoin trespass on land where complainant's title is admitted and threatened repeated trespass makes amounts recoverable at law disproportionate to expense.[52]

[46] Donovan v. Pennsylvania Co., 199 U. S. 305.
[47] Restatement of the Law of Torts, Vol. 4, p. 710.
[48] Restatement of the Law of Torts, Vol. 4, (Injunctions).
[49] Vol. 4, p. 709.
[50] Morris v. Cheney, 255 Pac. 987.
[51] Donoho v. Carbell, 138 Atl. 630.
[52] McRaven v. Culley, etc., 155 N. E. 282.

This relief will be refused where the injured party by one action at law can recover damages constituting complete and certain relief for the whole wrong.[52]

It has also been held that where continuous casting of rocks on the land of another by blasting operations may ripen into an easement, equity may interfere by injunction.[54]

On the other hand, depreciation in the value of adjoining property is not of itself insufficient to warrant injunctive relief.[55] Likewise, injunctive relief will not be granted against anticipated nuisance because of diminution in the value of the property or because of increased fire risks.[56]

Regarding injunctive relief, not only an individual but a city may enjoin acts constituting a private nuisance as a protection against improper conduct of any lawful business.[57] Nevertheless, a lawful business will not be enjoined because it causes some slight inconvenience or irritation to residents in the vicinity.[58] Lastly, the mere fear alone of threatening damage will not of itself justify this relief.[59]*

[52]Thrasher v. Hodge, 283 Pac. 219.
[54]East v. Sacks, 106 So. 185.
[55]Hazlett v. Marland Refining Co., 30 Fed. 2d 808.
[56]Nevins v. McGavock, 106 So. 597.
[57]Jones v. City of Los Angeles, 295 Pac. 14.
[58]Bove v. Donner-Hanna Coke Corp., 254 N. Y. S. 403, 415.
[59]Phillips v. Allingham, 33 Pac. 2d 910.
*For additional authorities see: Fourth Decennial Digest, Vol. 24, 953; Fourth Decennial Digest, Vol. 16, 1445; 32 Corpus Juris, 138-139; Hakkila v. Old Colony, 162 N. E. 895.

CONCLUSION

The authorities cited in this paper, and they are practically inclusive on the subject, lead to but one conclusion—that the use or storage of explosives, because of the extreme hazard involved, places a serious responsibility upon their use or storage from which there is not much escape in the event of an injury to either persons or property, especially to young children. Regarding injunctive relief against blasting, obviously the courts refrain from promiscuously granting this relief unless the peculiar circumstances warrant it. Naturally, if it is to be granted upon slight provocation, material hardship would be the result because by its use, necessary construction, quarrying, and the expansion of highways could be crippled or permanently enjoined.

D E B A T E

Before
CUYAHOGA COUNTY BAR ASSOCIATION
Cleveland, Ohio
March 31, 1942

By Robert Guinther, Akron, Ohio

Let me make very clear, at the outset, that I express here only the views of Robert Guinther. I am not the representative of any group of insurance carriers. I do not speak for or on behalf of any insurance company. I have not consulted with or discussed this subject with the claim agent of any insurance company. I have no firsthand knowledge of the wishes or desires of any insurance company as to whether legislation to make it a party defendant in personal injury or death cases from accident should be opposed or encouraged. Nor am I interested in the point of view of an insurance carrier. My whole interest is that of one who engages in the practice of the law, and regards it, even in this day, as a learned profession instead of merely a trade by which a living may be earned.

I know that I stand on firm ground before this group when I assert that we must continue to look upon the practice of the law as a profession—not as a trade—for no organization in the country has been so active as your own in carrying on the fight against the Unauthorized Practice of the Law. You have urged —and rightly—that education and training are essential to proper service of the public, and have sought to keep persons lacking proper education and training from offering legal service to the public.

You have been highly successful in your efforts, because you have said—and rightly—that your prime interest was in assuring the best good to the public, and not in merely preserving your private money-making fields from trespass by others. If you had bottomed

your campaign on the mercenary ground that lawyers must be given a monopoly to perform some services which the public requires, sure I am that the tree which you planted would have borne only bitter fruit. It was your insistence that the practice of law is a profession—to be conducted by men of high training and with proper ethical guides—that gave strength to your efforts, and made this Association an object of interest to lawyers throughout the entire country.

My own and individual points of views may best be understood if I tell you that I am just a common or garden variety of lawyer engaged in general practice in a medium sized city of a quarter of a million. The law firm in which I work has never been able to engage in the expensive luxury of specialization or departmentalization. Accordingly, I have carried on the practice of law on the old-fashioned theory of "come one, come all." I do a considerable quantity of litigation, but it is litigation of all varieties. I practice before a good many Boards and Commissions. During the year 1941 my appearance before Courts ranged from the Municipal Court of Akron to the Supreme Court of the United States—up or down, as you please. I presented matters to the United States Board of Tax Appeals, Ohio Board of Tax Appeals, the S.E.C. and the Interstate Commerce Commission, and half a dozen other Commissions or Agencies. I speak of this only that you may know that I do not, as Mr. Harrison seeks to suggest, expend all my efforts in the defense of casualty cases, although I find myself before a jury from time to time speaking on behalf of a defendant whom I represent because an insurance company pays me to do so. I think it is proper to say, further, that I have presented many cases for plaintiffs, in personal injury cases, and that I rely for part of the income which is now taxed away from me, upon contingent fees in cases where the final judgment is paid by insurance carriers. Accordingly, I am not insensible to the fact that the ability to earn contingent fees depends, in part, upon being able to convey to jurors an adequate stream of information that they can properly be generous because the pocketbook to be opened is that of an insurance company rather than the defendant seated at the trial table.

Nevertheless, I continue to believe that the profession of the law will be the gainer if lawsuits for personal injury or death continue to be a controversy between the plaintiff and the claimed tort-feasor, with complete elimination of an indemnitor as a party defendant.

It is understood, of course, that the insurance companies which we are talking about are those which have issued contracts to indemnify automobile owners and possibly landlords or operators of businesses. The obligation of the contract is to indemnify the insured against loss which he otherwise would sustain if a judgment went against him by reason of his wrong-doing or that of his servant. The contract always contains another obligation, i.e., that the indemnitor will pay for defending the action, and save the insured the expense of paying for defending the suit against him. A by-product of such insurance contracts nowadays is that they provide financial security to the injured person, as well as indemnity against loss to the insured, and, accordingly, there is an amazingly wide-spread idea that casualty insurance — particularly automobile casualty insurance—is taken out to provide protection for the persons who may be injured on the highway. Because many persons with little or no financial responsibility occupy the highways with automobiles, and because the injury is just as severe if inflicted by a person who is financially irresponsible as by one who is, public opinion has run in the direction of limiting the use of the highways to those who can pay for the distress of their victims, if they have accidents on the highway. The promise of a financially sound insurance company that it will pay is usually taken as being even better than the operator's liability to pay for his wrong doing. The idea that the public is entitled to have torts committed only by financially responsible persons has, thus far, been limited to the field of torts by automobile and, of course, stems from the background of public ownership of the highways, and public right to limit their use to persons who can afford to pay for accidents if they have them. Compulsory automobile liability insurance has been discussed for long, long years but the experience of Massachusetts persuades most states to stay away from that method of keeping financially irresponsible drivers off the road, and most states have adopted the ancient dog-bite theory: that it's all right to let the automobile operator have one accident, just as the dog in ancient days was entitled to one bite, but that the operator won't be allowed the right to use the highway and have a second acci-

dent unless he has paid for the effects of the first one, if it was his fault.

No efforts have as yet been made to limit operation of retail stores only to those who are financially able to pay if a customer slips on a lettuce leaf, or to limit the right to manufacture bottle drinks or canned foods to those manufacturers who have good Dun & Bradstreet ratings, or have paid the premium for a policy issued by a good indemnity company.

By legislation in Ohio, we have said that the indemnity contract is something more than just a promise to repay the insured if he loses and has to pay in a lawsuit. We have said that the legal liability of the insurer to the insured can be reached by a judgment creditor of the insured. If it was at one time possible for the insurer to accept a premium, and then refuse to pay because the insured—financially irresponsible—had lost nothing in that none of his property or money had been used to pay the judgment—that time has now passed. The indemnitor is bound to pay, if legal liability of the insured has been established, assuming, of course, that the insurance contract has really gone into effect and that the insured has not breached some condition subsequent.

But the obligation of the insurer is still only an obligation to pay if the insured is legally liable, and, accordingly, the controversy in the personal injury action is a controversy as to whether the insured is legally liable—not whether he is financially responsible. The question is not whether he will be able to pay, but whether he was at fault. Appearance of the indemnitor as a party can do nothing to help solve that question. On the contrary, such appearance may cause the belief that it isn't necessary to solve the question at all and that it's perfectly proper to award a judgment against the defendant—not because he was at fault but because the defendant won't have to pay it anyway, and because it seems a generous idea to let the plaintiff have a verdict which the defendant doesn't have to pay.

It is plain that the provisions of our general code do not require or permit an indemnitor to be made a party defendant in a cause wherein the "controversy" is as to whether the defendant was at fault. Section 11255 reads:

> "Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of a question involved therein."

The "Controversy" and "question" referred to in the section is the controversy or question raised by the pleadings. In the automobile casualty case that controversy or question is whether the defendant has been negligent, and, frequently, whether claimed contributory negligence on the part of the plaintiff takes away his right to relief. Put in simple terms, the whole question or controversy is as to whether the accident was the defendant's fault or the plaintiff's fault. It ought to be plain that the answer to that question or controversy has no relation to the problem of whether a defendant is financially able to pay, if he is found to be the one at fault. Accordingly, the addition of the insurer as a party defendant is neither permitted nor required by Section 11255, for the defendant's ability to pay is not a question or controversy presented to the jury.

Obviously, a very different situation is presented where the principal and surety are joined as defendants in an action in which the plaintiff claims that there has been a breach of the conditions of an agreement which the two have joined in signing. Cases in which suit is brought upon a contract are, of course, separate and distinct from the tort cases which we are here considering.

If, then, the presence of the insurer as a party is not essential to deciding whether the defendant was at fault, what reason is there why the insurer should be named as a party?

If the explanation is that thereby the plaintiff is more sure to get a verdict and get compensation for his injuries, then I say that such a result does violence to the theory that the plaintiff is entitled to a verdict and compensation only if the defendant is at fault and he, the plaintiff, is free from fault. Continued violence to the theory will ultimately result in its abandonment and substitution of a system of compensation for all injuries irrespective of fault: the removal of the trial of personal injury cases from the Courts, and the creation of a Board or Commission to make awards without consideration of the actions of either plaintiff or defendant. I shall, shortly, speak of the effect upon the lawyer's practice of a system of compensation for automobile injuries which leaves out the factor of determination of fault.

If the answer is that the insurance company is paying the cost of defending the

case and, therefore, ought to be made a party defendant, I say that that is a complete non-sequitur. The insurer's contract requires it to pay for the defense and to pay the judgment, if one goes in favor of the plaintiff. But the question of who is paying for the defense and who may pay the judgment is not the question or controversy presented for decision, which is, to repeat: "Who was at fault as to the happening of the accident?"

The effect upon juries of knowlege that an insurer may be paying for the defense and may pay the judgment, if rendered, has been discussed as much in Ohio as anywhere. We have gone up the hill and down again on the subject of right to make inquiries about insurance companies on the voir dire examination of the jury. Our Supreme Court said one thing in the Pavilonis case (*Pavilonis v. Valentine*, 120 O. S. 154). It said a different thing in the Vega case (*Vega, Admr. v. Evans*, 128 O. S. 535). It modified both statements in the Dowd-Feder case (*Dowd-Feder, Inc. v. Truesdell*, 130 O. S. 530). In the Pavilonis case, former Chief Justice Marshall succinctly stated the effect of intrusion before a jury of the idea that there was an insurance company available to pay the verdict. He said: (Page 163-120 O. S.)

"The issue to be determined by the jury is whether the actual defendant to the suit has been guilty of negligence, and, if so, whether that negligence is a proximate cause of the injury, and, if those matters are determined in plaintiff's favor, what damage has been suffered. No one would contend that a different rule of negligence or a different measure of damage would apply because the defendant may have taken the precaution to purchase indemnity insurance. The question of propriety of the voir dire examination is only presented where an insurance company is indemnitor but is not actively participating in the defense. And whatever may be said pro and con on this subject, it must be clearly apparent to every one that the reason for pursuing the examination, where the insurance company is not ostensibly interested, is not for the purpose of eliminating interested jurors, but to arouse the feelings of those who are accepted as jurors. Such questions are asked for the purpose of insinuating, or, as it sometimes happens, plainly indicating the background presence of an insurance company. The fact that such methods are resorted to by counsel for the plaintiff, and that they are so stoutly resisted by counsel for the defendant, is proof sufficient that the experiences of the past have shown that verdicts are facilitated and the amount of recovery augmented by such means."

And in response to the question as to why automobile casaulty insurers were different from other litigants, he said: (Page 171)

"The answer is that the rule is not different, but that a different method of approach becomes necessary because automobile negligence cases constitute a very large proportion of the whole number of litigated cases, and because experience has shown that parties insured for $5,000 frequently are subjected to verdicts for $10,000, $15,000, or more."

And Judge Jones said: (Page 176)

"As it turned out, while each one of the 18 jurors called disclaimed any connection with a casualty company, each of them was inoculated with a very prejudicial suggestion that an insurance company was actually involved, and that a verdict against the defendant would be mitigated by recoupment from his insurer. This and this only was accomplished by the voir dire examination; here is a concrete case showing the unwisdom of such examination, which, while resulting in no cause for challenge to the plaintiff, was extremely damaging to the defendant."

And an even more logically expressed statement was made by Judge Wilkin in the Vega case, as follows: (128 O. S. 541)

"It cannot be asserted with too much emphasis that the insurance company is not the real party defendant. The parties involved in the action for damages should be the same as the parties involved in the accident or injury. And a sound public policy requires the determination of the question of liability by reference to the issues between such parties only, without reference to their contracts with others. There is no more reason to say that an indemnity insurance company is party to the suit because it has a liability to pay the judgment, or part of it, than there is to say that attorneys for a plaintiff are

parties to a suit because they have been assigned an interest in the judgment to secure their fees. And it deserves to be repeated that the contract of the insurance company is not 'to indemnify persons who are injured', but to indemnify the assured only to the extent of his legal liability.

"Counsel for plaintiff frankly stated in argument that it is well known that one element in the jury's determination of the amount of the verdict is the ability of the defendant to pay, and insisted that the existence of an insurance contract bears materially upon that point. Is a defendant to be penalized for his prudence and providence? Would counsel say that a defendant's savings should be disclosed?"

The experience of every lawyer tells him that the judicial statements are grounded in fact. Jurors are more willing to return verdicts against defendants if they, the jurors, think that the defendant won't have to pay but some insurance company will. Knowledge of the extent of the insurance coverage affects the size of the verdict. If jurors are to be informed, in any fashion, as to the existence of a promise to indemnify the defendant, they ought to have further information as to the extent of the indemnity so that they can tell whether their verdict is within or above the policy limits, and thereby avoiding hurting the defendant's pocketbook while, at the same time, being sufficiently generous with plaintiff.

The mere insinuation, by means of questions on voir dire, of the idea that there may possibly be an insurer who will pay the judgment, is now thought to be insufficient. It is now suggested that the jury shall be *informed* that, in fact, there is an insurance policy, and be further informed, of course, as to the extent to which it covers the operator. Such information will be given to the jury by having the insurer named as a party defendant and having it set up its interest of indemnity.

It seems clear that the reason for advancing the newer suggestion is because the mere insinuation, through voir dire, does not produce results sufficiently effective, and because it is believed that actual knowledge of financial responsibility through an insurer will more frequently lead a jury to give a verdict for plaintiff, whereas otherwise it might find for defendant. If knowledge on the part of the jurors doesn't affect them, then, plainly, there is no logical reason for giving it to them, and it is properly excluded just as other interesting but irrelevant matter is rejected when offered in evidence. This sole and only relevancy of knowledge of the fact and amount of insurance is that thereby the jury is given knowledge of the financial condition of the operator, and that someone other than the operator may be called to pay the verdict. And yet—how absurd the idea that, in a negligence case, the jury should give any consideration at all as to the financial resources of the defendant. In principle, we say that the jury should find the figure which will represent fair and adequate compensation to the plaintiff, whether the defendant is wealthy or poor. Conveying knowledge to the jury of the amount which can be paid by an insurance company without hurting the defendant is a wilful and direct stultification of the principles which we proclaim.

Note, thus, that I am one of those who believe that knowledge of the existence of a contract to indemnify, and of its amount, directly affects the verdict of a jury, both as to whether it shall be for the plaintiff instead of the defendant and as to its amount. Everyone of you believes the same thing. If such knowledge did not produce such an effect, lawyers for plaintiffs wouldn't care whether juries had it or not and wouldn't try to get it to juries. Lawyers for defendants wouldn't try to defeat the efforts of others to let the jury know about the insurance. Practical experience in getting verdicts for plaintiffs tells me that they are easier to get when the jury learns that it can be generous to the plaintiff without reaching into the pocketbook of the defendant who sits at the trial table.

But getting verdicts for plaintiffs isn't the purpose and objective of trial litigation. That purpose and objective is to determine whether the plaintiff or the defendant was at fault. At least, so we say!

We say stoutly that we proceed upon the principle that a defendant shall be called upon to pay only if the evidence shall prove his fault. We cannot say that and in the same breath say that we want the jury to know about an insurance company so that there will be a better chance of getting a verdict for the plaintiff, even if the accident wasn't all the defendant's fault. One or the other of the propositions must fall. If we want the first one to fall, let's be bold enough to say so. Let's be matter-of-fact enough to say that we want plaintiffs to get paid by insurance

companies, even though the automobile operator who has the policy wasn't at fault, and even though the plaintiff may have been at fault. Let's be open enough to admit that we want to have the insurance company brought on to the record so that the jury can fix the amount of the verdict according to the size of the policy.

Well, the end result seems to me to be plain. First, premiums for automobile liability policies will be run so high that an ordinary man can't afford them. Consequently, the ordinary man won't be able to use the highway, or if he does, and figures in an accident, it won't be worth the while to sue him, try the case, and get a judgment. Then, the ordinary man will insist that the state set up some kind of system whereby it will take care of defending him in suits, where he has been unable to buy insurance because of its high cost. And then, the injured persons will insist upon the state creating some kind of a fund out of which they can be paid, because the ordinary man hasn't been able to buy insurance from insurance companies which will see to paying them. And then, the state will do all the adjusting, and all the trying of claims arising out of motor vehicle cases. And then, the state will create a fund, by a tax upon every driver and upon every citizen with no regard for the number of miles he drives, or his skill or ability, and will administer that fund by paying—according to a schedule—for all injuries, no matter by whose fault they occurred. There will then be no trials, no verdicts, no recoveries, no contingent fees based upon the amount of recoveries. A Board or Commission will make the awards—strictly according to schedules—and lawyers will have as little place before such Board or Commission as they do before the Industrial Commission.

The story as to industrial accidents is an easy one to read in Ohio. Where the books were full of cases in which employees sued employers to get compensation for industrial injuries, the pages are now barren. Where formerly questions of fault between employer and employee were litigated, now there is no litigation as to the question of fault, and the thin trickle of litigation deals only with the question of whether the accident occurred in the course of employemnt—no matter who was at fault. The amount of lawyer's compensation for appearing in such litigation and in going through the procedural questions involved, is limited by statute.

I recognize that there are vast differences between State handling of employer-employee relationships, and State handling of the relationships between an automobile operator and one who has been injured by his automobile. I doubt greatly whether any satisfactory State administration of such a subject can be devised. I believe thoroughly, though, that we will be pushed in that direction and to the end of having an unsatisfactory State administration of compensation for all motor vehicle injuries, if we do not remain true to the principle that liability depends upon fault. When once we depart from that principle and permit liability to be fixed because some element is present other than fault, then, I think, we are sure to have to go all the rest of the way toward giving compensation for automobile injuries irrespective of fault.

Individually, I believe that our present system — with its imperfections — is better than the one which is sure to come if we give up the principle that liability rests wholly upon fault. Because I believe that, I think it is a mistake to permit the controversy or question as to fault to be affected by considerations which make it unnecessary to decide the issue squarely. I believe that the presence or absence of insurance coverage and its amount, is a subject of consideration which makes it impossible to decide squarely the issue of fault or no fault.

I believe it is more important to preserve a system—(to which every lawyer lends at least lip-service) than it is to gain a verdict. If the system is right we ought to maintain and preserve it. If it is wrong we ought boldly to advocate the adoption of a new one where the issue of fault is not the one to be tried. Because I believe that the system—even with imperfections—is right, I think we ought to maintain it instead of undermining and weakening it by bringing into consideration questions of ability to pay rather than confining consideration to the single question of fault or no fault.

It seems to me, too, somewhat idle to talk about motor vehicle casualty cases in a day when automobiles are being driven off the highway because no tires can replace the present ones when they are worn out. The number of automobiles on the road is already diminished. It will be reduced month by month, as persons substitute other transportation means for their private cars in an endeavor to make their tires last a longer period. Those who do drive, drive more slowly, and with more care. The incidence of ac-

cidents is bound to grow less. The problems of motor vehicle litigation are vanishing. Where now a major part of contested trials is the presentation of automobile accident cases, there may, in two or three years, be such a small number of them as to make them no longer a prime subject of interest for lawyers and courts.

Wisconsin, it is true, adopted a statute or rule permitting insurers to be joined with automobile operators. Wisconsin did this in 1936, when the flood of motor vehicle use was mounting—not when, as now, it is receding. I am not interested just now in whether the lawyers and the public think the Wisconsin law is good or bad. I will be more interested in their opinion after the tire rationing program has been in effect for a couple of years.

Put in plain words: I think this is a poor time to discuss the question which Mr. Harrison and myself have been assigned to debate. The public or legislators have little interest in the problem of how law suits are tried, or who are parties to them. Their whole absorption is in the best way to win the war —not the best way to try a lawsuit.

But, in some better day with the war behind us, the question will deserve decision. I believe that I shall then, as now, take the wholly professional point of view that a lawsuit for personal injuries from an auto accident ought to be decided wholly upon the issue of "whose fault it was" rather than have a verdict run to one side or the other dependent upon whether the defendant is financially able, through insurance, to pay the verdict.

Report of the Committee on Practice and Procedure

The Committee, as its major effort, determined to study the Federal Rules of Civil Procedure, with special reference to the question of amendments or additions thereto. Rules 1 to 37 were selected for study during the current year, with the expectation that the Committee would continue its study of the balance of the Rules during the coming year. Certain of the Rules were assigned to each member of the Committee for such study. Each member of the Committee was requested to report his findings and result of his study for future reference, and to make recommendations with reference to amendments and additions.

Arrangements were made with Editor, George W. Yancey, to publish the articles and reports written by the members of the Committee in the Journal. The first of those reports so published was the article by the Hon. William G. Pickrel of Dayton, Ohio, arising from the decision in the Touchey case, by the Supreme Court of the United States on November 17, 1941. It appears in the April, 1942, issue, page 17. One or more of the reports will be published in this issue of the Journal, and others will follow at a later date.

At the round table to be held at the next annual convention in August, a goodly portion of the time available will be devoted to discussion of any suggestions for amendments of the Rules covered by the several members of the Committee.

Subsequent to the adoption of this program by your Committee, the Supreme Court of the United States, on January 5, 1942, evidently anticipating the need of amendment to the Rules, appointed the surviving members of the previous Committee to make preparation of the Rules, as a continuing Advisory Committee, to advise the court with respect to proposed amendments or additions to the Rules of Civil Procedure for the District Courts. It will thus be seen that we anticipated the need.

From the reports of the members now in the hands of the Chairman, few amendments are indicated as necessary. Those few will be singled out for discussion at the round table meeting at the next convention, and for such action as the convention may desire to take in connection therewith.

It is anticipated that the successor Committee, during the forthcoming year, will continue the study of the balance of the Rules and that further study will be made as to those Rules for which amendments have been suggested.

The Committee feels that the practice in the District Courts has been greatly simplified because of the adoption of the Rules, the practice has been made uniform, quicker disposition of pending cases has been made possible, and the administration of justice as a whole has been improved. It would be highly desirable that uniformity, insofar as possible, between the Federal trial courts and the State

trial courts should be obtained and observed.

Attention might well be here directed to the fact that the Committee on Insurance Law Practice and Procedure of the Insurance Section of the American Bar Association has, during its existence, conducted a study of the Federal Rules of Civil Procedure. For a general summary of the work covered during the first year of that Committee's existence, reference is made to the American Bar Association's report, Section of Insurance Law, for 1940, pages 370 to 424; and for the year 1941 reference is made to the report of the American Bar Association, Section of Ins. Law, for that year, pages 295 and 329. See also the report in the Advance Program and Committee reports of the American Bar Association, Philadelphia meeting, for the Section of Insurance Law, pages 31 to 85 inclusive. Attorneys interested in the interpretation of the several rules will find these reports are very excellent starting points for investigation of questions affecting the Rules.

Respectfully submitted,
Wilbur E. Benoy, Chairman,
Charles H. Gover,
Clarence W. Heyl,
Lon Hocker, Jr.,
William G. Pickrel,
Price H. Topping,
F. G. Warren,
Pat H. Eager, Jr., ex-officio.

Report on Federal Rules 17 to 25, Inclusive, and Recent Decisions Thereunder

By F. G. Warren
Sioux Falls, South Dakota

THESE rules, 17 to 25 inclusive, are concerned with parties to actions including therein parties plaintiff and defendant, capacity to sue; joinder of claims and remedies; joinder of parties, interpleader; class actions, intervention and substitution of parties. These rules were carefully prepared and are, in the main, plain as to their meaning. No resume of the comments on the rules are made or comments on the subject matter contained therein, but this resume is concerned only with the report of certain, and particularly recent, decisions which are deemed to be perhaps of interest to members of the Association.

An examination of the decisions under these rules discloses that no immediate necessity for amendment of any of the rules is at this time apparent. The decisions of the court seem to be largely in line with the intentions of the framers of the rules in question and any attempt at amendment would probably only introduce uncertainties.

We note the article by John L. Barton of Omaha, Nebraska, in the January issue of the Insurance Counsel Journal concerned with all of the federal rules and their applicability to insurance litigation. Conspicuous because of its absence in this article are any decisions under group 2, parties, and concerned with the rules here under observation, and it is apparent that Mr. Barton, in his article, did not consider any of the decisions under these particular rules of apparent or immediate concern to the specialized branch of insurance litigation and in this we fully corroborate Mr. Barton's omission.

For the record, however, and to note briefly decisions of general interest relative to these rules we note the following decisions under the particular rules:

RULE 17 (a)—Real Party in Interest:

In Farmers Underwriters Association v. Wanner, 30 F. Supp. 358, a suit was brought under the Declaratory Judgment Act for a decree that plaintiff was not liable to defendants under a policy insuring against loss resulting from operation of automobile. The policy was issued by Farmers Automobile Interinsurance Exchange. The plaintiff was attorney in fact for the policy issuer. Objection was made that the plaintiff was not the real party in interest. In addition to being attorney in fact, the plaintiff was trustee of certain funds and properties under its exclusive management for the purpose of paying losses arising out of the action. The court held, on motion to dismiss, that plaintiff was the real party in interest as trustee of an express trust and was entitled as a real party in interest under the Declaratory Judgment Act to bring the action.

An important decision is *Harris v. Travelers Ins. Co.*, 40 F. Supp. 154. In that action

the defendant, Travelers Insurance Company, counterclaimed asking that the plaintiff and his Philadelphia bank, which was also demanding payment on the policies, be required to interplead. There was a motion to dismiss the counterclaim and interpleader. The court held there that an insurer who interpleads claimants to proceeds of policy is a real party in interest for the purpose of determining jurisdiction on the basis of diversity of citizenship and that an insurer of one state can interplead adverse claimants both citizens of the same other state. The court quotes from *Hunter v. Federal Life Insurance Co.*, 8 Cir., 111 F. 2d 551, a decision by the Eighth Circuit Court of Appeals, as follows:

> "While the question of federal jurisdiction under such circumstances as here exist will not be finally put to rest until decided by the Supreme Court of the United States * * *, we think that the right of a stakeholder to be relieved of vexation, the danger of multiple liability, and the responsibility of undertaking to decide, at his peril, which of two or more adverse claimants is entitled to money or property in his hands, has the effect of making him a real party in interest."

In *McWhirter v. Otis Elevator Co.*, 40 Fed. Supp. 11, an action was brought for personal injury from a fall down an elevator shaft. The answer of the defendant, among other defenses, sets up that plaintiff has received substantial compensation for his injuries and has released his employer, Memorial Hospital, and Liberty Mutual Insurance Company, the employer's liability insurer, from liability on account of the accident and that by reason thereof whatever rights plaintiff may have to the extent of the note paid reside in the hospital and the insurance company and that plaintiff was not the sole or real party in interest. It was decided by the court that without the presence of the hospital and the insurance company the court cannot bind them or pass judgment upon their rights under their agreement or otherwise in the action and that the hopsital and insurance company are real parties in interest and the suit must be prosecuted in their names along with that of the plaintiff, and that under Rule 21 the hospital and insurance company may be added by order of the court on motion of any party or on the initiative of the court at any stage of the action.

RULE 17 (b)—Capacity to Sue or to be Sued:

When this rule was in hearing before the Judiciary Committee of the House of Representatives some objection was raised, the contention being that the rule would permit suits to be brought against unincorporated associations which previously did not have capacity to sue or be sued and the corporations could escape suit if the law of the state in which such corporations were organized so provided. The Advisory Committee took an opposite position and it seems that the decisions of the courts have borne out the contentions of the Advisory Committee. This is apparent from the case of *Bicknell v. Lloyd-Smith*, 109 F. 2d 527. It was there held that the provisions of Rule 17 (b) were paramount to the provisions of Rule 66. The reported case holds that a statutory bank receiver or conservator appointed in the state of Michigan could sue in the Federal District Court in the State of New York without the necessity of ancillary appointment as receiver in the state of New York. The decision deals only with the right of a statutory receiver to sue in the federal courts of another state but the reasoning of the decision goes further and includes also a receiver appointed by a state court which perhaps is dictum. The decision apparently limits the effect of Rule 66 to receivers appointed by federal courts noting that in Rule 66 the phrase "appointed by the court" is not at all appropriate to appointment by a state court and for that matter is not very appropriate to appointment by another federal court and notes further that had the intent been to make the rule apply to all receivers, no matter what court appointed them, we should expect the indefinite particle, "appointed by a court," or even, "appointed by any court." The court is in apparent disagreement with the construction placed on this rule by Professor Moore in his work "Federal Practice." Of course, the statutes in New York provide that a foreign receiver may sue without ancillary appointment.

RULE 18—Joinder of Claims and Remedies:

A counterclaim to a counterclaim may be interposed under this rule according to the decision of *Warren v. Indian Refining Co.*, 30 F. Supp. 281. In this case plaintiff sought to recover on a bond on which the United States Fidelity & Guaranty Company was surety in an injunction suit. Defendant ans-

wered counterclaiming damages on a contract or commission agency agreement. To this counterclaim the plaintiff filed a counterclaim admitting the execution of the commission agreement but asking damages for combination and conspiracy to restrict and restrain trade in violation of the anti-trust law of Indiana. This, of course, brought the lawsuit far afield from its original purpose. The court, however, permitted the counterclaim to stand on motion and says:

> "Strange as this new doctrine of pleading seems to be, I am of the opinion that the new rules contemplate that the plaintiff may file a counterclaim to a counterclaim, and for that reason the motion to strike plaintiff's counterclaim is overruled and defendant is granted an exception."

In the case of *Jennings v. Beach,* 1 F. R. D. 442, an attempt was made to join an insurance company as co-defendant of the insured. The Federal District Court was in Massachusetts where it was improper under the state statute to join the insurance company as a co-defendant. Plaintiffs relied on Rule 18 (b) as authority for their right to join the insurance company. On motion the court dismissed the complaint as to the insurance company determining that this rule was never intended to cover a situation such as presented. The court notes further with respect to the joinder:

> "While the question of the joinder of an insurance company as a party defendant is primarily procedural, nevertheless, the ground for denial of such a right, in part, is the possibility of prejudice through the knowledge by the jury that a verdict will be paid by an insurance company."

RULE 20—Permissive Joinder of Parties:

In *Thomson v. United Glazing Co.,* 36 F. Supp. 527, it was held that an automobile owner and passenger sustaining injuries in a collision with defendant's automobile properly joined in a single action since the right of each arose out of the same transaction. It does not appear, from the decision, whether each plaintiff was suing for $3,000.00 which would appear to be a necessary prerequisite to the joinder as was held in the case of *Edelhertz v. Matlack,* 42 F. Supp. 309. In that action in the answer filed plaintiff asked leave to amend his complaint to show the owner of the automobile was his wife and to add her as additional plaintiff and allow her to insert her claim for $600.00 damage to the automobile. The court there held that the claim of husband for personal injuries to himself and the claim of his wife for property damage are separate and distinct claims for which separate suits could be brought against the defendants and that it was essential, therefore, that the demand of each plaintiff be of the requisite jurisdictional amount.

RULE 21—Misjoinder and Non-Joinder of Parties:

Reference to this rule in the case of *McWhirter v. Otis Elevator Co.,* 40 F. Supp. 11, has been heretofore made in connection with Rule 17 (a) where the court noted that a hospital and insurance company could be added as defendants on motion at any stage in the proceedings. The facts of the case are set out under Rule 17 (a).

In the case of *United States v. Swink,* 41 Fed. Supp. 98, an action was brought against the defendant as trustee to recover for delinquent taxes. An attempt was made by motion to strike the words trustee, etc. following the name of the defendant and to add F. G. Swink, individually, intending that the motion could be granted under Rule 21. The court denied the motion stating the rule to be, which is the matter of interest here:

> "In my opinion Rule 21 was not adopted to give relief to a plaintiff who sues the wrong party but to a plaintiff who sues too many parties or not enough parties."

RULE 28—Interpleader:

This is a rule which should be of considerable interest in conection with insurance litigation. In this connection we observe that the Interpleader Act of 1936, 28 U. S. C. A., Sec. 41, (26), provides for an action in interpleader which has been largely used in insurance matters. Under this statute it was necessary that the adverse claimants reside in different states under the jurisdictional requirements. Under Rule 22, however, it is sufficient if diversity of citizenship exists between the party seeking interpleader and the claimants, but unlike the 1936 act both of the interpleaded claimants may reside in the same jurisdiction. This is directly held in the case of *Harris v. Travelers Insurance Company,* 40 F. Supp. 154. Under this decision, construing Rule 22, this rule affords a remedy in addition to but not superseding the Interpleader Act of 1936. In the Harris

case both the plaintiff and the interpleaded bank were citizens of Pennsylvania.

RULE 23—Class Actions & RULE 24—Intervention:

Rule 23 and Rule 24 have had probably more attention by the courts than the prior rules discussed. An examination of the decisions under these rules, however, indicates that these particular rules have but small interest in connection with insurance litigation and that no useful purpose could be served by attempting to analyze or harmonize the decisions thereunder.

Expanding Federal Jurisdiction Under Third-Party Practice

By Lon Hocker, Jr.
St. Louis, Missouri

THE Act enabling the Supreme Court to adopt the new rules, U. S. C., Title 27, Sec. 723-b, 48 Stat. 1064, provides:

> "The Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. . . "

The rules themselves contain the following admonition (Rule 82):

> "These rules shall not be construed to extend or limit the jurisdiction of the district courts of the United States, or the venue of actions therein."

Thus, Congress cautioned the Supreme Court, and the Supreme Court cautioned the interpreters of the rules, that the *jurisdiction* of the district courts could not be, and were not, affected by the rules. Such a caution was unnecessary, to be sure, for the Constitution had prescribed once for all the maximum extent of the jurisdiction of the district courts (Art. III, Sec. 2), and Congress (the only authority empowered to that end by the Constitution) had prescribed the minimum limits thereof.

The Supreme Court, therefore, has no power to alter federal district court jurisdiction—to increase it, or to diminish it—and Rule 82's disclaimer of any such intention goes without saying.

> "Circuit courts [presently district courts] do not derive their judicial power immediately from the Constitution, as appears with sufficient explicitness from the Constitution itself, as the 1st section of the 3d article provides that 'the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish.' Consequently, the jurisdiction of the circuit court in every case must depend upon some act of Congress, as it is clear that Congress, inasmuch as it possesses the power to ordain and establish all courts inferior to the Supreme Court, may also define their jurisdiction. Courts created by statute can have no jurisdiction in controversies between party and party but such as the statute confers." *Grover & S. B. M. Co. vs. Florence S.M . Co.*, 85 U. S. 553, 577, 18 Wall. 553, 577, 21 L. Ed. 914, 919.

With all of this authority, it is surprising to find that in one case at least, the new rules actually do confer jurisdiction on the district courts, where jurisdiction did not exist before, where jurisdiction is not conferred by the Constitution, to wit, in controversies between citizens of the same state, where no federal or admiralty question is presented, nor conflicting state land grants involved.

Everyman, a citizen of Connecticut, has an auto liability policy in the Adamantine Insurance Co., of Hartford, Connecticut. He has an accident, but fails to report it to the insuror. A dispute arises over the question of coverage. Has the United States District Court jurisdiction over this controversy?

Obviously not, you say. But the answer is not so easy as that, for Jones, who was injured in Everyman's accident, is a resident of Massachusetts, and brings suit for personal injuries in the United States District Court in Connecticut, and Everyman has is-

sued a third party summons (Rule 14) for the Adamantine Insurance Co.

Into the *federal court, under* compulsion, comes the third party defendant, to litigate with its fellow-citizen a controversy about a private contract! The amount in controversy need not exceed three thousand dollars, and Jones need not be in the court house when this controversy is litigated!

> "But in case the insurer denies liability and refuses to defend the action in accordance with its policy, I see no logical reason to deny to the insured, who is the defendant in a suit, the right to bring in the insurer as a third-party defendant, where under the terms of its policy it will be liable over to the insured defendant and where the judgment against the defendant will establish the liability of the insurer. Of course in such case the defendant insurer is entitled to a hearing and trial of any defenses that it may set up against its liability, and it is probable that the court would order a separate trial of its controversy with its insured under Rule 42 (b)."

Chestnut, J., in *Tullgren vs. Jasper,* 27 F. Supp. 413, 416.

It is almost unanimously held, under Rule 14, that no diversity of citizenship (or other ground of federal jurisdiction) need exist as an independent basis of jurisdiction to support a third-party claim.

Tullgren vs. Jasper, 27 F. Supp. 413;
Barkey vs. Don Lee, Inc., 34 F. Supp. 874;
Gray vs. Hartford Acc. & Ind. Co., 31 F. Supp. 299;
Schram vs. Roney, 30 F. Supp. 458;
Morrell vs. United Air L. T. Corp., 29 F. Supp. 757;
Crum vs. Appalachian Elec. Power Co., 29 F. Supp. 90;
Burris vs. American Chide Co., 29 F. Supp. 773;
Satink vs. Holland Tp., 28 F. Supp. 67;
Bossard vs. McGwinn, 27 F. Supp. 412;
Sklar vs. Hayes, 1 F. R. D., 415;
Kravas vs. Grt. A. & P. Tea Co., 28 F. Supp. 66;
Hoskie vs. Prudential Ins. Co., 39 F. Supp. 305;
Metzger vs. Breeze Corp., 37 F. Supp. 693;
Macklind vs. Arundel Corp., 36 F. Supp. 948;
Sussan vs. Strasser, 36 F. Supp. 266;
Herrington vs. Jones, 2 F. R. D. 108;
People of Illinois vs. Maryland Cas. Co., 2 F. R. D. 241.

Semble Contra

Johnson vs. G. J. Sherrard Co., 2 F. R. D. 164;
Thompson vs. Cranston, 2 F. R. D. 270;
Whitmire vs. Partin, 2 F. R. D. 83.

This holding is ordinarily based on two grounds: (1) That where jurisdiction vests in the district court by virtue of the plaintiff's original claim, the court will assume jurisdiction over matters purely ancillary to the original suit; (2) That the framers of the rules must have meant such a result to follow, since Form 22, accompanying the rules which relate to third-party complaints, unlike the forms for original complaints, omits any allegations of jurisdiction. *Satink vs. Holland Tp., Supra.*

The second basis is impertinent. Granting the nicety of the syllogism, still the authority upon which it is built is not properly founded. Jurisdiction must spring from the Constitution, and through it, from Congress, and not from the drafters of Form 22!

The first ground springs from the admiralty practice (Admiralty Rule 56) and the similar practice in equity, where jurisdiction of the *res* has been acquired. (*Tullgren vs. Jasper,* 27 F. Supp. 413, citing *Alexander vs. Hillman,* 296 U. S. 222, 239, where the suit was *in rem.*) A landlubber lawyer dassn't dip too deep into the admiralty rules, although the authorities cited, like the equity cases, do not seem to involve any real question of jurisdiction of the third party claim. The real objection to this argument, however, is quite different.

All of the authorities prior to the adoption of the rules declined to accept third-party defendants lacking the jurisdictional qualifications, where state practice (imported by the Conformity Act) authorized such procedure. And these decisions did so on the express ground that there was no jurisdiction to decide controversies between such parties.

In the case of *Osthaus vs. Button,* 17 F. (2d) 392, C. C. A. 3, March, 1934, the original defendant obtained an order issuing a summons for a third-party defendant by authority of the Pennsylvania Scire Facias Act. On order of the third-party defendant the motion for the writ of scire facias was quashed. The Court held (1. c. 394):

"Since the plaintiff in the instant case cannot directly initiate suit against the additional defendant in a Federal Court because there is no diversity of citizenship shown, they cannot indirectly pursue such action."

In *Galveston, Harrisburg & San Antonio Railway Company vs. Hall,* 70 F. (2d) 608, C. C. A. 5, May, 1934, the plaintiff sued the railroad for loss of cattle. The railroad brought into court, under the Texas practice, the County of Uvalde, Texas, as its indemnitor, as would be possible under the present third-party practice under the new Federal rules. The court held (1.c. 610):

"The case of the railroad company against the county ought not to have been tried by the District Court for want of federal jurisdiction. That controversy is not between citizens of different states, it does not arise under the Constitution or laws of the United States, nor by reason of parties or subject-matter come otherwise within the federal judicial power. Only by a sort of dependent jurisdiction arising out of the suit of Hall against the railroad company could it possibly be tried in a federal court. * * * The two controversies here are wholly distinct in parties and subject-matter. Hall was suing the railroad company, with which alone he had dealings, for negligence. He had no claim against the county, for it is not liable in tort for negligence, and he had no contract with it. Although the railroad company claims a valid contract with the county and a right of action over on it if Hall succeeds, Hall's case ought not to be complicated and delayed by mingling with it the trial of the independent issues as to the contract. * * * The controversy with Hall, which was removable and was removed, was wholly distinct from that between the railroad company and the county. The character of the former as involving a federal question could not be imparted to the latter. The separate verdict rendered between the railroad company and the county ought to be annulled, together with so much of the judgment as rests upon it, for want of jurisdiction, and the so-called cross-action ought to be dismissed."

In *Wilson vs. United American Lines,* 21 F. (2d) 872, Wilson brought a wrongful death action against United American Lines, which issued a third-party summons under the provisions of the Civil Practice Act of the State of New York by order of the district court, in which the action was pending, on the grounds that the third-party defendant was liable to it for any judgment which Wilson might recover against it. The Court held, l. c. 873:

"This is a separate controversy between the United American Lines, Inc., and the Davis Engineering Corporation, and the facts and law applicable to that controversy are not the same as those applying to the controversy between the plaintiff, Wilson, and the United American Lines, Inc., under section 193, subd. 2, of the Civil Practice Act, the defendant is permitted to frame a supplemental pleading in the nature of a complaint against the party which it seeks to bring in, which, if sustained, entitles the defendant to appropriate relief against the defendant impleaded. In the event that the plaintiff, Wilson, succeeds against the defendant United American Lines, Inc., there would be a judgment by the plaintiff against the defendant, and if the United American Lines, Inc., were successful in its controversy with the Davis Engineering Corporation, there would be a judgment in its favor against the Davis Engineering Corporation. [Citing authorities.] This bringing in by the defendant of another party by the original defendant is in the nature of a new and separate action, for the pleadings are not necessarily the same as in the original action and the judgment is separate; the judgments differ, both as to parties and possibly as to the amounts.

* * * "There is no ground here upon which this court would acquire jurisdiction of the controversy between the United American Lines, Inc., and the Davis Engineering Corporation. Section 193, subd. 2, of the Civil Practice Act of New York, permits a defendant to implead another defendant under certain circumstances; but it cannot bestow jurisdiction upon this court where the court lacks fundamental jurisdiction. The state act cannot do indirectly what it is powerless to do directly.

"Accordingly the motion to set aside the service of the summons and cross-complaint is granted."

In *Lowry and Company, Inc., vs. National City Bank of New York*, 28 F. (2d) 895, the defendant, in the District Court sought to summons in two defendants which it complained were indemnitors of its own under the New York Civil Practice Act authorizing such procedure. One of these third-party defendants had diversity of citizenship with the plaintiff, and one did not. The Court permitted a summons as to the former, but not as to the latter. It held (l.c. 896):

> "Conformity to the practice in the state courts prescribed by Section 914, R.S. (28 U. S. C. A., Sec. 724), is necessarily subject to limitations imposed by the Constitution and laws of the United States upon the jurisdiction of the District Courts and and by statutes regulating procedure in these courts. The provisions of the Civil Practice Act of the state here in question embody a most desirable reform in judicial procedure. * * * Subject to the limitation upon the power of this court to hear and determine only such cases and controversies as are within the statutory definition of its jurisdiction, this remedial statute would receive liberal application and interpretation."

In *Sperry vs. Keeler Transportation Line, Inc.*, 28 F. (2d) 897, a motion was made by the defendant under Sec. 193, Subdivision 2, of the Civil Practice Act of the State of New York to bring in as a third-party defendant its indemnitor under contract. The Court held:

> "From the affidavits submitted with the motion papers, it is apparent that the facts which the plaintiff alleges in her complaint are not the same as those which the Keeler Transportation Line, Inc., bases its claim against Whitney & Kemmerer, Inc., upon; that Keeler Transportation Line, Inc., seeks to recover indemnity from Whitney & Kemmerer, Inc., upon its contract with Whitney & Kemmerer, Inc., a matter in which the plaintiff is not interested; in other words, a separate controversy between Keeler Transportation Line, Inc., and Whitney & Kemmerer, Inc., and the question is whether this court has jurisdiction over this controversy between Keeler Transportation Line, Inc., and Whitney & Kemmerer, Inc., both of which are New York Corporations. Clearly, this court has no jurisdiction, as there is no diversity of citizenship and no Federal Statute or a Constitutional question is involved."

In the fine, the paradox is as follows: The Supreme Court cannot alter the jurisdiction of the district courts. Congress cannot enlarge it beyond the limits of Article III, Section 2. Although the district courts had no jurisdiction to decide these controversies before, the adoption of the new rules by the Supreme Court, pursuant to a Congressional enabling act, has extended their jurisdiction to controversies not envisioned by the Constitution.

This expansion (not to say alteration) of the Constitution has been accomplished by the use of the word "ancillary." It is, and has been, the custom of the times to substitute words for ideas—to hoodwink ourselves with wolf-ideas in sheep-words' clothing. Who can raise his voice against "social security" or "fair labor standards"? Who want to return to the horse and buggy days, or to vote for a tory?

But the discipline of the war effort is making a healthier nation of us. We are beginning to make our own decisions by our own brains. Coincidentally, we find three of the latest decisions on this phase of the rules questioning the meaning of the magic word "ancillary." As yet, so far as I have found, no Court of Appeals has addressed itself to this question.

May such a court remember the thought of Tennyson's Flower In A Crannied Wall: that everything in the world is "ancillary" to every other thing, and that there was no impediment to preventing the Constitutional Convention's concluding the list of controversies cognizable in the federal judiciary with the clause, "and ancillary controversies."

Report of Highway Safety and Financial Responsibility Committee

THIS Committee submitted its report at the 1941 annual convention at White Sulphur Springs and three recommendations were made therein to the Association, which were as follows:

(1) That the members of this Association observe the operation and experience of these laws so that amendments may be suggested and recommended as such experience shows to be necessary after a fair period of observation.

(2) We feel that the present name of this Committee is a misnomer. We therefore recommend that the name of the said committee be changed to—"The Committee on Highway Safety and Financial Responsibility Legislation," or such other appropriate name as the Executive Committee may select.

(3) That the Committee be continued or a new committee be appointed for the primary purpose of observing the operation and experience of the New York and New Hampshire Financial Responsibility Laws. (October, 1941, Journal).

The members of the Committee felt that pursuant to its 1941 Annual Report, that the operation of the New York and New Hampshire Financial Responsibility laws should be observed through 1942 in order that the experience gained from the enforcement of these laws could be passed on to the Association as a proper function of this Committee and which experience would be helpful to the Committee and the Association in dealing with the subject under discussion.

Your Chairman has had the valuable assistance, in promulgating this report, of Mr. Louis E. Wyman of Manchester, New Hampshire, and Mr. Milton L. Baier, Vice President and Claims Counsel, Merchants Mutual Casualty Company of Buffalo, New York.

The New Hampshire Law

This Financial Responsibility Law was enacted in 1937 and took effect on September 1st of that year. The Commissioner of Motor Vehicles was authorized to administer the Act and to adopt and enforce such regulations as he deemed necessary for its administration.

At the outset, the general feeling of lawyers and laymen alike was that the Act was cumbersome and uncertain. However, as time went on that feeling was superseded by a feeling that perhaps too much authority was placed in the Commissioner of Motor Vehicles. Active antagonism, however, has gradually fallen off and for the most part it has been accepted as good legislation. During the first few years after the law became effective, there was agitation for repeal of the law and adoption of compulsory insurance. The objection to compulsory insurance is and was so strong that it is thought that such legislation would have little, if any, chance of passing.

The administration of the Act, on a whole, has been excellent which has aided to a large degree in its gradual acceptance by the public.

Few changes have been made by amendment to the original Act, certainly none of which could be called radical. The original Act called for a report to the Commissioner of any accident involving personal injury or more than $25.00 property damage. This has not been changed.

In 1939 municipally owned fire department vehicles were exempted from its provisions. (Laws of 1939, Chapter 163). Also in 1939 members of the National Guard, while operating motor vehicles owned by or under lease to the Federal Government under orders from the proper authorities, were exempted from its provisions. (Laws of 1939, Chapter 153). These are the only specific exemptions noted relative to municipally owned or Federally owned vehicles.

In 1941 the following amendment was made: (Laws of 1941, Chapter 63):

"9. Limitation. The provisions of Section 6 shall not apply: (a) to the owner of a motor vehicle, trailer or semi-trailer operated by one having obtained possession or control thereof without his express or implied consent; (b) to either the owner or operator of a motor vehicle, trailer or semi-trailer involved in an accident when the commissioner shall be satisfied that neither caused nor contributed to cause the accident; (c) to either the owner or opera-

tor of a motor vehicle, trailer or semi-trailer involved in an accident that was caused by the criminal act of a third party, for which criminal act such other party has been convicted; (d) to either the owner or operator of a motor vehicle, trailer or semi-trailer involved in an accident wherein no damage or injury was caused to other than the person or property of such owner or operator."

There is little doubt but that the enactment of this legislation has increased the amount of property damage and liability insurance carried by car owners in this state. However, an exact percentage figure of that increase which might be attributed to the legislation itself is, of course, almost impossible to estimate. It is, however, safe to assume that the law itself has resulted in at least a 20 per cent increase in insured vehicles.

Generally speaking, there can be little doubt but that the situation prior to 1937 has been improved by the enactment of this law, both from the standpoint of the insured and of the claimant. In any given accident the assured must necessarily be better off for having insurance and the claimant is in a like position.

In *Rosenblum vs. Griffin*, 89 N. H. 314 (1938), the Court upheld the right of the Commissioner to suspend licenses and demand security before fault had been fixed.

In *University Overland Express, Inc., vs. Griffin*, 89 N. H. 395 (1938), the Supreme Court of New Hampshire held that a demand for security for liabilities incurred outside of this state cannot be applied and enforced against a non-resident engaged in inter-state commerce.

These are the only two cases which the Committee has been able to find wherein the Supreme Court of New Hampshire passed upon any features of the law.

It may be said that the New Hampshire financial responsibility law is functioning smoothly, with very definite beneficial results and that the public reaction is favorable.

The New York Law

Chapter 375, of the Laws of 1942 amended the safety responsibility provisions of the Vehicle and Traffic Law so that a report of accident of property damage need only be made where the damage to the property of any one person, including the property of the person making the report, is in excess of $25.00. Previously, the law required a report of all property damage accidents.

Chapter 943 of the Laws of 1942 amended the law to make it clear that a judgment, as defined in the law, shall include a judgment of any Province in Canada, the Dominion of Canada, the District of Columbia, or the United States.

Chapter 855 of the Laws of 1942 amended the law to the effect that when proof of future responsibility is furnished by an employer on behalf of his chauffeur who has become subject to the law, such a chauffeur will not be required to furnish security for the accident which made him subject to the law.

The effect of this amendment is to enable such a driver to drive the automobile of his employer only, without making deposit of security for the past accident, and without himself furnishing proof of financial responsibility for the future so long as the automobile is covered by insurance or other satisfactory proof of responsibility is furnished by the employer.

Chapter 720 of the Laws of 1942 amended the former law to eliminate the so-called "non-marketability feature." Under the law prior to the amendment, if an automobile which had been damaged in an accident was sold by the owner and repaired and later transferred to an ultimate retail user, this purchaser was unable to obtain registration of the vehicle. Naturally, this innocent purchaser was aggrieved because of his failure under the former law to obtain registration of the vehicle. With the amendment of 1942 this feature of the law was eliminated.

Chapter 718 of the Laws of 1942 amended the former Act so that it is not operative as to taxi cabs and other public carriers which are at present subject to a compulsory insurance law, nor to vehicles owned by the United States, the State of New York, or any political subdivision thereof.

Chapter 854 of the Laws of 1942 amended the former Act to provide that the sections requiring the Motor Vehicle Commissioner to take action upon receipt of a motor vehicle accident report shall not apply to an owner or operator if such owner was protected under a standard provisions liability policy issued by an authorized insurer, or if such vehicle was a foreign vehicle provided it was covered by a policy substantially equivalent to a standard provisions policy, nor shall it apply to an owner or operator who was covered by any other form of liability insurance policy.

The effect of this amendment is to permit

a person who has become subject to the law to continue to drive and to retain his license plates so long as he had a standard insurance policy in effect, even though under the circumstances, the particular accident was not covered by such policy. If there was no coverage and the judgment subsequently obtained was unsatisfied, the driver would be removed from the road by reason of such judgment.

The amendments set forth above to the original Act are noted here because they seem to be of considerable importance and in fact, are radical changes from the former Act.

In New York State, the details of administration have been quite well established and the law is functioning smoothly as long as it has been in operation. One serious objection arose from the requirement that all accidents involving damage to property must be reported. Despite the fact that the Department tried to educate the people not to report such property damage accident unless the damage exceeded twenty-five dollars since the Department knew that the law was going to be amended in this respect, many such reports were received. As a matter of fact, the Department was receiving some three thousand reports a day which, obviously, requires a tremendous personnel to handle. Since the law has been amended, only some fifteen hundred reports a day are being received, and even yet, many of these report property damage accidents where the damage does not exceed twenty-five dollars.

Before the enactment of this law, it was estimated that only some 30 per cent of the automobiles registered in New York State were insured. Within two months from the effective date of the law, the Commissioner of Motor Vehicles of New York, Carroll E. Mealey, estimated that some 65 or 70 per cent of such registered automobiles carry both liability and property damage insurance. Obviously, as the law continues to function and reaches the uninsured motorist, this percentage will be increased.

Since the number of people insured is materially increased, the degree of protection to the people generally is materially increased from a financial viewpoint. Likewise, since the law becomes operative immediately upon the happening of the accident, a careless or even blameless motorist who is not financially responsible will be removed from the road.

The Committee feels that the foregoing report, while not as extensive as it might be, is sufficient to keep the members of the Association advised of the operation of the laws involving financial responsibility in the States of New Hampshire and New York and will bring to the attention of the members the changes which have occurred through legislation this year.

The Committee feels that sufficient time has not elapsed to definitely make any recommendation to the Association with reference to the operation and enforcement of these laws but that it is in line with the function of this Committee to observe and report to the Association from time to time with respect to these laws.

Respectfully submitted,
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HERBERT W. J. HARGRAVE
LOUIS ELIOT WYMAN
RICHARD H. FIELD
RAYMOND N. CAVERLY
MILTON L. BAIER
L. J. CAREY
FRANCIS M. HOLT

Report of Committee on the Unauthorized Practice of Law

The Committee has not held any formal meetings because of the present emergency, the wide separation of the membership, and the more important fact that nothing requiring definite consideration or action has been referred to or brought to the attention of the Committee. However, the Chairman has corresponded with all members and has endeavored to keep in touch with such devlopments as have occurred.

This subject has been thoroughly discussed and litigated during the past few years and there is not a great deal left for the Committee to consider. The Committee has not heard recently of any important new controveries arising, which undoubtedly is the result of the work done by the Standing Committee on Unauthorized Practice of Law of the American Bar Association and the Standing Conference Committee that was organized to work in cooperation with that Committee. There is still pending the controversy regarding the appearance of laymen before Federal Government and State Bureaus, although because of the war it seems to have died down. It might well be a matter, however,

for the succeeding Committee to investigate.

One of the members of the Committee, Mr. J. M. Sweitzer, has made the suggestion that in connection with the activity of lay claim adjusters, it is most certain that every company wishes to comply with the principles heretofore established. It is possible that some of our members may have occasion to observe some activity on the part of an adjuster that may go beyond proper limits. Mr. Sweitzer has just recently suggested that any company would welcome information indicating that one of its men "got off the reservation." It is further suggested that there is no reason why the members of the Bar Association should not be encouraged to report to this Committee any violation by an adjuster. The information could then be kept confidential as far as the reporting member is concerned and be forwarded to the company involved. We, of course, could not act as policemen but it is believed that all companies would welcome the information.

During the present crisis it is important that the work of the Committee continue, but any great activity must necessarily be limited except in the event of unforeseen and special circumstances, at which time the Committee should be in a position and ready to cooperate with the American Bar Association and its Standing Committee on Unauthorized Practice of Law.

Respectfully submitted,

RALPH R. HAWXHURST, *Chairman*
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Preliminary Report of Fidelity & Surety Law Committee

The following preliminary report is submitted on behalf of the committee, and consists simply of a memorandum of subjects under consideration. We have had correspondence among the members of the committee, and correspondence and consultations with some of the present and former officers and members of the Executive Committee of the Association, and intend to prepare a report which will be available at the convention of the Association. Meanwhile any comments and suggestions from members of the Association will be welcome, and will be given consideration in connection with the final report of the committee.

1. The effect of the war (including related Federal legislation) on Fidelity and Surety bonds.

(a) Illegality or impossibility of performance of outstanding executory bonds;

(b) Questions arising under new bonds, if entered into in the usual form, and possible desirable modifications of forms previously in use.

2. Further consideration of interpretation and questions arising under banker's and broker's blanket bonds. See articles by Mr. Henry W. Nichols (American Bar Association Insurance Section Report for 1938, page 132), and by your chairman (American Bar Association Insurance Section Report for 1941, page 194) supplementary thereto.

3. Limitation of subrogation rights where defendants' equities are considered equal. See *National Surety Corporation v. Edwards House Company,* Supreme Court of Mississippi, October 22, 1941, 4 Southern, 2d, 340.

(a) Possibility of providing some protection for the surety in the bond application.

In connection with the foregoing, it is not intended that the committee shall undertake to formulate specific amendments of bond forms or other documents. If changes are considered desirable or worthy of consideration, it is our purpose to consider and report upon the substance of any proposed change and the results to be accomplished. Draftsmanship, whether of bond forms or legislation, is a subject unto itself. It has its own difficult problems, coming properly within the scope of the activities of other associations and committees constituted and duly authorized to recommend specific changes.

Respectfully submitted,

FRANK M. COBOURN, *Chairman.*
WILLIAM R. EATON
STEVENS T. MASON
HENRY W. NICHOLS
CHARLES A. NOONE
GUILLERMO DIAZ ROMANACH
PATRICK F. BURKE, *Ex-Officio.*

Report of Committee On Workmen's Compensation

NO subject or question has been referred to this Committee for its attention during the course of the past year. The Committee has considered for its report many problems arising in the field of workmen's compensation law with a view to selecting a subject of timely pertinence and a subject of common interest to the various members of the association. It was felt that a discussion of the impact of the war upon workmen's compensation systems would be a matter of current general interest because the problem is basically the same whether the particular jurisdiction has by legislation provided for protection from economic loss from industrial accidents by state funds exclusively, self-insuring employers, or by permitting coverage by private insurance carriers, or by a combination thereof.

The hazard of attack by bombings and other methods upon defense industries is present and is not a remote probability. The all-out effort of the government for this total war means that practically every industry, large or small, is a possible objective of enemy attack with consequent casualties and economic loss. Industrial experience over a period of years in various fields has permitted the formulation of a yardstick whereby, within reasonable limits, the economic loss from industrial accidents could be anticipated and provisions made therefor. It must be conceded, however, that such experience table could not and has not ever had occasion to include as a basis for calculation, losses as a result of enemy attack or other hazards of war.

As a matter of justice it would seem highly inequitable that the economic loss suffered by employers, state compensation funds or insurance companies covering risks of accidents and injuries to industrial employees should be borne by particular sections of the country because the geographical location of these sections make them peculiarly vulnerable to enemy attacks. If an aircraft plant in Los Angeles should be bombed with resultant loss of life and injuries to employees it would be manifestly unfair to require the insurance carrier covering the particular risk to carry the burden alone and particularly in view of the fact that the risk was an unanticipated one for which no premium was charged or collected. This is obviously contrary to the very basic concepts of sound insurance. The same thing would be equally applicable to state workmen's funds and self-insuring employers neither of whom could possibly be expected to absorb such losses. From every standpoint there can be no doubt but that the problem presented should be one of national concern and not of local responsibility.

Congress has already acted to provide protection from loss by property damage. Under and by virtue of the authority granted the Reconstruction Finance Corporation (15 U. S. C. A. 606 B and 606 J.) a corporation known as the War Damage Corporation was formed. Effective March 27, 1942, it was provided by Congress (14 U. S. C. A. Section 606 B-2) that funds for the operation of this corporation, not to exceed in the aggregate $1,000,000,000, were to be supplied. The purpose of the corporation is to provide through insurance, reinsurance or otherwise, reasonable protection against loss of or damage to property, real or personal, which may result from enemy attack (including any action taken by the military, naval, or air forces of the United States in resisting enemy attack) with such general exceptions as the War Damage Corporation with the approval of the Secretary of Commerce, may deem advisable. Provision is further made for the general machinery to carry out the purpose of the Act.

Again, in the field of Marine Insurance, Congress has acted to meet a need created as a result of the war. Among other things, one of the functions of the United States Maritime Commission is to insure against loss or damage by the risks of war certain specified property used in the commerce of the United States (46 U. S. C. A. Section 1128, et seq). Provision is also made for reinsurance by the Commission of any company authorized to do an insurance business in any state of the United States on account of marine and marine war risks assumed by such company on property covered by the Act and further to reinsure against risk assumed on loss of life, personal injury or detention by U. S. Government following capture of masters, officers and crews of American vessels. In addition to the power to reinsure risks already outstanding, the Commission is author-

ized to distribute the risk of loss by reinsurance of any of the war risks assumed by the Commission directly.

As above pointed out, Congress has already acted to cover and protect certain types of loss as a result of the war risk. It is submitted that the need of such protection is patently clear and urgent in the field of workmen's compensation. Steps have already been taken in this direction and at the time of the preparation of this discussion Senate Bill No. 2412 has been favorably reported to the Senate by the Committee on Education and Labor.

The Act in its present form is known as "Civilian War Benefits and War Relief Act of 1942." Patterned to some extent after the Act in effect in England, the purpose of the legislation in a general way, is to provide benefits by way of compensation and medical benefits with respect to the injury, disability, death, or enemy detention of civilians arising out of the present war. Space will not premit a discussion of the Act in its entirety and no attempt is made here to do this. It is sufficient to say that the Act in its present form is aimed generally to protect against financial and economic dislocation of individuals which would be a certainty in the event of enemy attack. The Act provides for benefits to civilians who are injured or killed as the result of a "war injury" arising from a "war-risk hazard" as these terms are defined by the Act.

As a part of the above-mentioned proposed legislation an attempt has been made to provide protection in the field of workmen's compensation. The suggested form of legislation here pertinent (Title I Section 104) is as follows:

"Reimbursement (b) Under regulations prescribed by the Administrator, any employer or insurance carrier or compensation fund insuring workmen's compensation liability (other than the United States Government and the Employee Compensation Fund established under the Act entitled 'An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes', approved September 7, 1916, as amended), which pays workmen's compensation benefits to any person or fund with respect to a war injury or death proximately arising from such injury, under any law of the United States or of any State, Territory, or possession of the United States, or of the District of Columbia, shall be reimbursed for the benefits so paid, including funeral and burial expenses, medical, hospital, or other similar costs for treatment and care, and reasonable and necessary claims expense in connection therewith.

"Limitation on Reimbursement (c) No such reimbursement shall be made under sub-section (b) in any case (1) in which the Adminstrator finds that the benefits paid were on account of injury or death which arose from a war-risk hazard for which a premium (which included an additional charge or loading for such hazard) was charged, or (2) with respect to which reimbursement may be made under Title III."

The term "war injury" is defined by the act as follows:

"Sec. 106. As used in this title (a) The term 'war injury' means—

(1) a personal injury sustained after December 6, 1941, proximately resulting from war-risk hazard (as defined in title IV), and includes any disease proximately resulting from such personal injury;

(2) In the case of a civilian defense worker, it also includes a personal injury sustained by such worker after December 6, 1941, while in the performance of his duty as such worker, or disease incurred by him which was proximately caused by his performance of such duty after such date; and

(3) in the case of a civilian detained by the enemy whose detention commenced after December 6, 1941, it also includes a personal injury or disease proximately resulting from such detention."

The term "war-risk hazard" is defined [Title IV Section 401 (d)] as follows:

"(d) The term 'war-risk hazard' means any hazard arising after December 6, 1941, and prior to the end of the present war, from—

(1) the discharge of any missile (including liquids and gas) or the use of any weapon, explosive, or other noxious thing by the enemy or in combating an attack or an imagined attack by an enemy; or

(2) action of the enemy, including rebellion or insurrection against the United States or any of its Allies; or

(3) the discharge or explosion of munitions intended for use in connection with the national war effort (except with respect to any employee of a manufacturer or processor of munitions during the manufacture, or processing thereof, or while stored on the premises of the manufacturer or processor); or

(4) the collision of vessels in convoy or the operation of vessels or aircraft without running lights or without other customary peacetime aids to navigation; or

(5) the operation of vessels or aircraft in a zone of hostilities or engaged in war activities; or

(6) black-outs, including practice black-outs."

Administration of the Act is placed in the hands of the Federal Security Adminstrator and it should be noted that an important feature of the proposed legislation is the phrase "under regulations prescribed by the Administrator." On these regulations a great part of the success of the Act hinges so far as the workmen's compensation feature is concerned. With reference to the workmen's compensation phase of the Act it must be conceded that Congress is faced with a difficult problem in enacting legislation to meet the need in view of the variances and differences in legislation among the various states.

In legislation of this kind, therefore, it is only natural that various problems immediately become apparent. One of the questions which arises is whether an employee suffering a "war injury" or his dependents would proceed to secure relief under the "Civilian War Benefits and Relief Act" or under the Workmen's Compensation Act of his or their particular state. There is no prohibition for a civilian employee injured in the course of his employment from proceeding under the Federal Act. He could also proceed under the State Act if there were coverage of course. If the latter course be followed then as above pointed out, the agency paying the compensation is reimbursed by the Federal Government. If the employee in addition to seeking workmen's compensation benefits seeks reimbusement under the Federal Act, provision is made in section 104 (a) for reduction of compensation payable by the Federal Government by the amount of any "noncontributory Government benefit" or by one half of any "contributory benefit." Government benefit (Title I Section 104 (a) "means a cash benefit, allowance, annuity, or compensation (including payments under any workmen's compensation law but excluding payments under any unemployment compensation law) payable by reason of the past employment or services of any individual, under law or plan of the United States, any State, Territory, possession, or the District of Columbia, or any political subdivision or any wholly owned instrumentality of any of the foregoing, creating a system of cash payments to individuals (including payments made under any such law or plan by private insurance carriers); but shall not include any payment of War-Risk insurance, United States life insurance, or National Service life insurance." The act distinguishes further between "contributory" and "noncontributory" benefits as follows (Title I Section 104 (a): "Such benefit shall be deemed to be 'noncontributory' with respect to any person if the Administrator finds that with respect to him the benefit system is supported without direct and substantial contributions by wage earners, and shall be deemed to be 'contributory' if the Administrator finds that with respect to him the system is supported substantially by direct contributions by wage earners and substantially from other sources." There is no doubt but that workmen's compensation should be defined as a 'noncontributory' Government benefit." The situation is clear therefore that there is ample protection in the event that a claim for workmen's compensation be first filed.

The Act proposed is not clear however where compensation is received under the Federal Act and thereafter workmen's compensation is sought for a "war injury." In the same section providing for reduction of compensation under certain circumstances it is provided (Title I Section 104 (a): "In the event that any compensation payable under this title with respect to disability, death, or detention is not reduced by the amount provided for in this subsection, the Administrator shall have a lien and a right of recovery (to the extent of such amount) against any Government benefit on account of the same disability, death, or detention; and any amounts recovered under this subsection shall be covered into the Treasury as miscellaneous re-

ceipts." If the definition of "government benefit" (Title I Section 104 (a) as given in the Act be substituted this part of the Act would read as follows: "In the event that any compensation payable under this title with respect to disability, death, or detention is not reduced by the amount provided for in this subsection, the Administrator shall have a lien and a right of recovery (to the extent of such amount) against a cash benefit, allowance, annuity, or compensation (including payments under any workmen's compensation law but excluding payments under any unemployment compensation law) payable by reason of the past employment or services of any individual, under any law or plan of the United States, any State, Territory, possession or the District of Columbia, or any political subdivision or any wholly owned instrumentality of any of the foregoing, creating a system of cash payments to individuals (including payments made under any such law or plan by private insurance carriers); * * * and any amounts recovered under this subsection shall be covered into the Treasury as miscellaneous receipts."

Therefore, under the Act as it is now drafted, we would have an anomalous situation where an employee suffering from a "war injury" receives compensation under the Federal Act and the amount is not reduced by any amount paid under a workmen's compensation act or other "Government benefit." In this situation the Administrator is given a lien against any "Government benefit" on account of the same injury and the right of recovery for this amount. In the next subsection [Title I Section 104 (b)] which has been quoted, supra, however, the right of reimbursement is granted to any employer, insurance carrier or compensation fund which pays benefits *to any person or fund with* respect to a "war injury." The ambiguity is very apparent in that where no workmen's compensation benefits have been paid to an injured employee or his dependents and Federal payment has been made, the Administrator has a lien and right of recovery against any other money owing to the individual from a "Government benefit" which includes any money owing from a workmen's compensation fund, private insurance carrier, or self-insuring employer. This would certainly be proper to prevent a double payment but it raises a serious question when considered in conjunction with the right of reimbursement granted under the Act. This phase of legislation certainly needs clarification before its final enactment into law.

Another problem presented is that of reserves to be set up by the employer, state insurance fund, or insurance company. Immediately upon the occurrence of a casualty or accident, insurance companies in particular are required to set up a reserve to cover the anticipated loss: If the particular casualty attains catastrophic proportions, and this should occur in several localities at the same time and involve the same carrier, the machinery for reimbursement could be woefully inadequate to meet the situation. Under the Act no time limit is provided within which reimbursement must be made to the employer, insurance carrier or workmen's compensation fund for payments for a "war injury." Conceivably it could be provided by regulation that no reimbursement should be made by the Government before a claim is closed under the Workmen's Compensation Act. This could cover a period of many years. If a loss of uncontemplated proportions be added to the ordinary load from industrial accidents, unless early and immediate reimbursement be provided for, there will be a possibility of the breakdown of the existing machinery for workmen's compensation and the purpose of the Act defeated. As pointed out, supra, it is true that under the proposed legislation relief is provided for civilians without regard to injury or death in the course of employment, but it cannot be anticipated whether the injured workmen or his dependents will proceed under the provisions of the Federal Act or the State laws. Certainly it would seem inequitable to require the carrying of reserves over a period of years and require these funds to be frozen if the case is one where reimbursement will eventually be made by the Government.

The amount of payment for workmen's compensation varies to a high degree from jurisdiction to jurisdiction. There is also variance as to types of work covered. An employee in one section of the country might receive one amount for an injury while another employee in another jurisdiction receives a lesser amount for an identical injury. When the Federal Government has taken over the risk of loss to an employee by a "war injury" it might be argued that it would be inequitable to permit the variation in payments to employees depending on their geographical location. This matter was considered by the Committee in the Senate and in view of the

urgent necessity of the legislation and in further view of the non-feasibility of securing amendments to the various workmen's compensation acts, there was little which the Committee could do to correct any injustice which might exist in this respect. The payment of Federal benefits is of course uniform.

Title I Section 405 of the proposed legislation specifically makes final and conclusive the findings of the Administrator on all questions of law and fact in allowing or denying any payment under the Act. This includes, of course, decisions as to whether reimbursement should be made for payment of workmen's compensation benefits advanced. It is questioned whether this is desirable so far as the workmen's compensation phase of the Act is concerned. As to ordinary coverage under the act for civilians, it is felt that an unwarranted burden would be placed on the Federal Courts by permitting reviews. Losses and questions arising from reimbursement to state compensation funds, insurance companies, or self-insuring employers is an altogether different matter, however, and may involve very substantial property rights. The decisions of the Administrator should be subject to judicial review.

This decision is based on proposed legislation and of course it may be that some of the features of the proposed Act as herein discussed may be eliminated or changed before the Act is finally passed. If the proposed legislation has not been enacted into law at the time of the publication of this report, members of the association having constructive criticisms of the Act are urged to make these criticisms known to the members of Congress. There are many other questions which have not been touched upon in respect to workmen's compensation feature of the proposed Act but it was the aim of the Committee to discuss and present only a resume of contemplated steps of the Government to protect workmen's compensation systems from unusual financial strain by assuming its proper responsibility for the war-risk hazards to industrial employees.

Respectfully Submitted,

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CHARLES T. LEVINESS, III
DAVID I. MCALISTER,
ROBERT M. NELSON,
THOMAS N. BARTLETT, *Ex-Officio*

Report of Committee on Health & Accident Insurance Law

THE Committee on Health & Accident Insurance Law reports as follows:

At the American Bar Association meeting at Indianapolis last September the Health & Accident Insurance Law Committee of that Association reported its first year's work upon annotation of a health and accident insurance policy in general use. This annotation covered all except the Insuring Clause and Parts II, III and IV and consisted of twenty-eight mimeographed (single spaced) pages. That Committee is at present making efforts to perfect that report, condense it if possible, and bring the annotation down to date. The thirteen members each have an assignment of part of the work.

This annotation is similar in nature to the annotations of the automobile liability policy which have been so helpful to the bar.

Unfortunately the entire supply of this report was exhausted at the convention and is not available. However, it is to be hoped that it, like the automobile liability policy annotate, will be printed and made available to all.

Respectfully submitted,

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Settlement in States That Allow Contribution Among Tort-Feasors

By Herbert L. Bloom
Second Vice President Lumbermens Mutual Casualty Company, Chicago, Illinois

THE rule that there can be no right of action for contribution between joint tort feasors is generally accepted as the Common Law in most jurisdictions except where changed by statute. It developed from the English Decision in Merryweather vs. Nixan, 101 Eng. Rep. 1337, decided by the King's Bench in 1799. We can be certain that there were no suits pending in their courts for injuries alleged to have been caused by the negligent operation of Motor Vehicles. The standard of care expected from the reasonable and prudent man in those days was no doubt very much different than that expected by the present judge or jury. Because of their way of living, means of transportation, manufacture, and industry, that rule was no doubt fair and equitable but it has long outlived its usefulness in our present way of life.

In the Merryweather case the plaintiff was seeking contribution of 840L which the plaintiff had been forced to pay under a joint judgment rendered in an action on the case brought by a third person for injury done to a reversionary interest in a mill. Lord Kenyon held that the plaintiff could not recover since there was no precedent for such recovery between joint-wrongdoers. It appears that the tort-feasors were acting in concert and that they were conscious of their actual wrongdoing.

The rule originated in that decision has been followed in case after case in almost every jurisdiction, even in cases where the wrongdoer could not be considered as conscious of moral wrong but was really guilty of a technical or unconscious error. In the light of our present day decisions in actions for negligence, the decision of Lord Kenyon seems unfortunate. It may be wrong to condemn the learned Judge for that opinion as he no doubt expressed the view that was prevalent at that time but we should condemn our own laws for failing to recognize the unfairness of the rule. It is unfair because the plaintiff can choose one tort-feasor and levy against him and upon payment relieve the others of liability. His choice may be to compensate the other for aid given in the trial of the case or he may enter into a secret agreement for a consideration to levy against the other judgment debtor. It seems reasonable and fair to allow the plaintiff to recover from either defendant but by making that choice he should not be permitted to injure or penalize one in order to favor the other.

The Admiralty Courts reached a different conclusion and the rule has now been changed in England but still many of our American States follow the old outmoded principle adopted in 1799. Some states have changed the rule but there are so many different kinds of laws adopted that it is confusing to keep up with the different State laws.

A number of states have laws which allow a contribution between joint tort-feasors when there is a joint judgment against two or more parties. This rule still allows the plaintiff to pick the one against which he wants to proceed to the exclusion of the other joint tort-feasors. When a judgment is entered against only one party, he does not have a right to proceed for contribution against the others. This rule is followed in New York[1], Georgia[2], Kansas[3], Kentucky[4], Louisiana[5], New Mexico[6], Missouri[7], Virginia[8], West Virginia[9].

The Legislature of Michigan under Act No. 303, Public Acts of 1941, passed a law allowing a pro-rata contribution between joint judgment debtors in actions for bodily injury or death.

In Minnesota[10] and Pennsylvania[11] the Courts reached the conclusion that there was a right of contribution between joint tort-feasors by decision. Minnesota has modified the rule so that where a tort-feasor is guilty of a conscious or actual wrongdoing, such as the conscious violation of a law, he cannot recover any part of the loss from other joint tort-feasors. This rule seems sound in those cases where there is a malicious or intentional act on the part of one or more persons to injure another. If this rule is applied where there is a violation of the right of way law, or many other traffic regulations in motor vehicle accidents, it seems somewhat harsh and unfair.

In order to provide an equitable rule, there should be:

1. A right of contribution between all joint tort-feasors and not merely joint judgment debtors.
2. The rules of procedure should provide a reasonable method for the enforcement by allowing the joinder of other tort-feasors in the original action started by the injured plaintiff if they were not all joined by the plaintiff.
3. The distribution of the loss should be equitably divided between solvent joint tort-feasors or those within the jurisdiction of the court. If a judgment is entered against three joint tort-feasors and one is insolvent or lives outside the jurisdiction of the court, then the defendant who satisfies the entire judgment should be able to recover one-half of his payment from the solvent debtor or the one within the jurisdiction of the court and not one-third.

The law drafted by the National Conference of Commissioners on Uniform State Laws (appendix 1) and recommended by them for adoption contains all of these necessary points and will no doubt be passed by many states in the future. It has with some modification been adopted by the Legislatures of Rhode Island[12], Arkansas[13], and Maryland[14].

The rules in effect in Wisconsin[15], Minnesota[10], North Carolina[16], Texas[17], and Pennsylvania [11], provide for contribution between joint tort-feasors and also allow the joinder of other defendants in the original action of the plaintiff so that all issues of negligence can be tried in the one hearing.

The problems presented in the settlement of negligence claims where there is no right of contribution are simple as one tort-feasor can dispose of his liability by entering into a settlement agreement with the injured party in the form of a Covenant Not To Sue or by obtaining a Common Law release. The Covenant does not extinguish the cause of action but serves to forever avoid any suit by the injured for damages. The Common Law release eliminates or satisfies all claims arising out of the negligent act. In other words, a release of one tort-feasor serves to release them all. This rule has often been attacked and Dean Wigmore is quoted as having said that it is a "surviving relic of the Cokian period of Metaphysics."

The problem of settlement where there is a right of contribution between join tort-feasors is not so simple and all claim men should recognize the principles involved or his settlement may only be the payment of an installment on a later judgment. A general release of all tort-feasors can be taken if it is clear that the parties intended that action and the language in a release which reads "release, acquit, and forever discharge John Doe *and any and all persons, firms and corporations* of and from any and all actions, etc." seems broad enough to release all joint tort-feasors.

An ordinary Covenant Not To Sue should not be used because this only effects the right of action of the injured plaintiff who has thereby agreed that he will forever refrain from suing the payor. If suit is thereafter started against the other tort-feasors, they have a right of action for contribution against the one who has taken a Covenant Not To Sue as his agreement with the injured party or plaintiff cannot release his obligation under the law to contribute equally with the other joint tort-feasors to the damages which they are required to pay under a judgment awarded by a Court or Jury.

Example:

A. Plaintiff injured through the joint negligence of B. and C. (joint tort-feasors).

B. Settle with A. for $500, and takes a Covenant Not To Sue.

C. Now alleges that B's negligence contributed to the accident and that he is entitled to have the damage awarded distributed equally between the two tort-feasors.

C's remedy is to petition the Court to join B as a defendant so that the liability of both parties can be tried in the same action. Or C can wait until the liability is tried and if a judgment is awarded against him can then sue B for a contribution and can recover if he proves that B's negligence contributed to the injury.

The contract entered into between A and B expressed in the form of a Covenant Not To Sue does not affect C's right to have B share the damage with him. The plaintiff no longer has a right to choose the party he wishes to penalize to the elimination of other joint tort-feasors.

I believe that one joint tort-feasor can settle his claim in those states which adopt the uniform law or which have other laws which allow a contribution between Joint Tort-Feasors by use of a "Special Release," (appendix II) similar to one prepared by a Wisconsin

lawyer under their law. This release applies only to the persons entering into the contract and specifically reserves to the injured party his right to proceed against the other joint tort-feasors.

It provides that the injured releases the payor from his pro-rata contribution to any judgment later obtained from all other tort-feasors. In other words if A settles his claim against B for $100, he agrees that the payment will release the payor from his obligation to contribute to C and therefore if A gets a judgment for $5,000. B's share, if B and C are jointly liable, is $2,500, and C's share $2,500, and since A has settled his claim against B for $100, he can recover $2,500 of the $5,000 judgment from C whose right of contribution against B is satisfied by the $100 payment and agreement previously entered into.

By this means of settlement one cannot consider his case closed after taking the release and making payment as he has an interest in the litigation between A and C because if C is not placed on notice he may satisfy the entire judgment and the contract with A is not binding on him and the payor would be obliged to pay him $2,500 under his right to contribution.

If the jury finds that B is not negligent and that C's negligence is the sole cause of the accident, then A can recover $5,000 from C, who is not entitled to any credit for contribution.

If the jury finds only B guilty of negligence, the special release will serve to satisfy that liability.

After settlement with a "Special Release" written notice should be given all other joint tort-feasors so that they can reduce the judgment by the payors pro-rata responsibility for contribution provided it is decided that he was jointly liable for the injury sustained by the plaintiff. If suit is later commenced against the joint tort-feasor he should ask that the payor be joined to determine his liability for contribution. His answer should deny any negligence on his part, but if he is found to be negligent the settlement previously made relieves him of further liability to the plaintiff and his payment to be considered as the pro-rata share of the contribution for which he is liable to the other joint tort-feasors.

Our experience in Wisconsin with this procedure has shown that we do not use the release often as a very high percentage of all cases are closed on a full release of all parties but in the few cases where used it is highly desirable and worthwhile. We have had very few cases where we must defend our position after the release is taken. And in those cases it is not necessary to produce many witnesses or enter into extended cross examination of the witnesses produced by the other parties because liability is settled even though the defendant is found guilty of negligence by the jury.

In all cases where our insured has been joined after settlement under the special form of release the other joint tort-feasors have arranged to settle their liability either before trial or during the trial of the case. We have never been asked to contribute to any additional settlement even though our payment was small in comparison with injury or damage of the plaintiff. We do not recommend this form of settlement until we find that the other joint tort-feasor will not contribute to any payment.

A Wisconsin[28] case has held that a person who has settled the claim by taking a release of all claims against all tort-feasors, could recover a pro-rata share from others jointly liable with him for the tort. This does not seem advisable unless the joint tort-feasors have stipulated that the amount of payment was reasonable as the payor will have the burden of proving that the other tort-feasors were guilty of negligence that he was a joint tort-feasor, and the amount paid in settlement was reasonable. This would be difficult to prove if the injured party did not care to cooperate or had left the jurisdiction.

Section 2, sub-section 4, of the proposed Uniform Act, provides "when there is such a disproportion of fault among joint tort-feasors as to render inequitable an equal distribution among them of the common liability by contribution, the relative degrees of fault of the joint tort-feasors shall be considered in determining their pro-rata shares." I understand that this section was proposed as optional.

The courts in Wisconsin have held that all joint tort-feasors must contribute on an equal basis and that their comparative negligence statute does not apply to the respective liability of each tort-feasor.

Many claim men and some lawyers do not distinguish between the liability of a principal and agent, master and servant, one liable under the law for the damage caused by

the operator of an automobile used with the owner's consent and the operator's liability and the liability of joint tort-feasors. Those persons are not joint tort-feasors because the principal, master and owner of the automobile are not joint tort-feasors with the agent, servant and driver of the loaned automobile as their responsibility to the injured person rises by operation of law and not because they have contributed to the action which brought about the injury. While they are jointly and severally liable to the injured person they are entitled to recover any loss they suffer from the person primarily responsible for the negligence which brought about the injury.

Example:

A, injured by B, an employee of E, while in the course of his employment, and C, an employee of F, while in the course of his employment. B, C, E, and F, are liable for the damage caused by their acts. If B satisfies a judgment obtained in this case he could not secure a contribution from E, or F. He could recover a contribution from C, as B and C are joint tort-feasors, but E and F are not joint tort-feasors with either B or C. The same rule applies to agent and principal, and the owner who is liable for the acts of the driver to whom he has loaned his automobile.

Is a tort-feasor barred from contribution when one of the joint tort-feasors is a person who has no liability to the injured plaintiff, such as in the states which do not allow a recovery for tort between (a) Husband and Wife, (b) Parent and Child, (c) Employer under Workmen's Compensation Law, or (d) Action barred by the Statute of Limitations as to one tort-feasor?

The Wisconsin Supreme Court in Zutter vs. O'Connell, 200 Wisconsin 601, 229 N. W. 74, (1930) said:

> "Phillip Zutter is the father of Donald Zutter and under the doctrine of Wick vs. Wick, 192 Wisconsin 260, there could be no recovery against him by his son. Although the verdict established the fact that the accident was the result of the concurring negligence of both Thomas O'Connell and Phillip Zutter, the right of contribution does not spring from concurring negligence. *A common liability is the first essential for contribution.*
>
> Where one of the co-obligors has discharged more than his fair, equitable share of the common liability, a right of action arises in his favor against the other co-obligors, Sattler vs. Nicderkorn, 190 Wisconsin 464. In the absence of a common liability, there can be no contribution, although the negligence of Phillip Zutter concurred to produce the injuries suffered by Donald Zutter, his son, it gave rise to no liability on the part of Phillip Zutter. Thomas O'Connell, therefore, if and when he paid the judgment, discharged no part of Phillip Zutter's liability, which must be the basis of a right to contribution from Phillip Zutter."

The Court, in Britt vs. Buggs, 201 Wis. 533, 230 N. W. 621, (1930) held that where the defendant had relieved himself from liability for payment when he paid compensation pursuant to the compensation act, he had no common liability with other joint tort-feasors and was not liable for contribution.

We find many more decisions on the various problems arising under the right of contribution between joint tort-feasors in the State of Wisconsin than in other states because their law which is almost the same as the proposed uniform act has been in effect for more than 25 years and their courts have been progressive and wise in their approach to the subject.

You may ask why one should settle cases under the "Special Release" since it is technical and leaves the case open until the plaintiff has tried out his case against the other joint tort-feasor. Where there is a way to make settlement under "Special Release" it is easier to convince other joint tort-feasors to contribute. Tort-feasors who think they have a reasonable chance to win a case when he and the plaintiff direct their evidence and attack at one tort-feasor, do not care to be left alone in the action with the plaintiff directing his attack against himself alone. Experience has proven that it is effective but does not need to be used very often.

APPENDIX I

Uniform Contribution Among Tort-Feasors Act

An Act Concerning Contribution Among Tort-feasors, Release of Tort-feasors, Procedure Enabling Recovery of Contribution, and Making Uniform the Law with Reference Thereto.

Be it enacted, etc. (Use the proper enacting clause of the state.)

Section 1. (Joint Tort-feasors Defined.)
For the purpose of this Act the term "joint tort-feasors"
means two or more persons jointly or severally liable in tort
for the same injury to person or property, whether or not
judgment has been recovered against all or some of them.

* * *

Section 2. (Right of Contributions; Accrual; Pro Rata
Share.
(1) The right of contribution exists among joint tort-
feasors.
(2) A joint tort-feasor is not entitled to a money judgment
for contribution until he has by payment discharged the com-
mon liability or has paid more than his pro rata share thereof.
(3) A joint tort-feasor who enters into a settlement with
the injured person is not entitled to recover contribution
from another joint tort-feasor whose liability to the injured
person is not extinguished by the settlement.
(4) When there is such a disproportion of fault among
joint tort-feasors as to render inequitable an equal distribution
among them of the common liability by contribution, the rela-
tive degrees of fault of the joint tort-feasors shall be con-
sidered in determining their pro rata shares.)

* * *

Section 3. (Judgment Against One Tort-feasor.)
The recovery of a judgment by the injured person against
one joint tort-feasor does not discharge the other joint tort-
feasors.

* * *

Section 4. (Release: Effect on Injured Person's Claim.)
A release by the injured person of one joint tort-feasor,
whether before or after judgment, does not discharge the other
tort-feasors unless the release so provides; but reduces the
claim against the other tort-feasors in the amount of the con-
sideration paid for the release, or in any amount or proportion
by which the release provides that the total claim shall be
reduced, if greater than the consideration paid.

* * *

Section 5. (Release: Effect on Right of Contribution.)
A release by the injured person of one joint tort-feasor does
not relieve him from liability to make contribution to another
joint tort-feasor unless the release is given before the right of
the other tort-feasor to secure a money judgment for contribu-
tion has accrued, and provides for a reduction, to the extent of
the pro rata share of the released tort-feasor, of the injured
person's damages recoverable against all the other tort-feasors.

* * *

Section 6. (Indemnity.)
This Act does not impair any right of indemnity under exist-
ing law.

* * *

Section 7. (Third Party Practice, Amended Complaints,
Counterclaims and Cross-Complaints, and Motion Practice.)
(1) Before answering, a defendant seeking contribution in
a tort action may move ex parte or, after answering, on notice
to the plaintiff, for leave as a third-party plaintiff to serve a
Summons and complaint upon a person not a party to the ac-
tion who is or may be liable as a joint tort-feasor to him or to
the plaintiff for all or part of the plaintiff's claim against him.
If the motion is granted and the summons and complaint are
served, the person so served, hereinafter called the third-party

defendant, shall make his defense to the complaint of the plaintiff and to the third-party complaint in the same manner as defenses are made by an original defendant to an original complaint. The Third-party defendant may assert any defenses which the third-party plaintiff has to the plaintiff's Claim. The plaintiff shall amend his pleadings to assert against the third party defendant any claim which the plaintiff might have asserted against the third-party defendant had he been joined originally as a defendant. The third-party defendant is bound by the adjudication of the third-party plaintiff's liability to the plaintiff as well as of his own liability to the plaintiff and to the third-party plaintiff. A third-party defendant may proceed under this Section against any person not a party to the action who is or may be liable as a joint tort-feasor to him or to the third-party plaintiff for all or part of the claim made in the action against the third-party defendant.

(2) When a counterclaim is asserted against a plaintiff he may cause a third-party to be brought in under circumstances which under this Section would entitle a defendant to do so.

(3) A pleader may either (a) state as a cross-claim against a co-party any claim that the co-party is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant; or (b) move for judgment for contribution against any other joint judgment debtor, where in a single action a judgment has been entered against joint tort-feasors one of whom has discharged the judgment by payment or has paid more than his pro rata share thereof. If relief can be obtained as provided in this Subsection no independent action shall be maintained to enforce the claim for contribution.

(4) The court may render such judgments, one or more in number, as may be suitable under the provisions of this Act.

(5) As among joint tort-feasors against whom a judgment has been entered in a single action, the provisions of Section 2, Subsection (4) of this Act apply only if the issue of proportionate fault is litigated between them by cross-complaint in that action.

* * *

Section 8. (Constitutionality.) If any provision of this Act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

* * *

Section 9. (Uniformity of Interpretation.) This Act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states that enact it.

* * *

Section 10. (Short Title.) This Act may be cited as the Uniform Contribution among Tort-feasors Act.

* * *

Section 11. (Repeal.) All acts or parts of acts which are inconsistent with the provisions of this Act are hereby repealed.

* * *

Section 12. (Time of Taking Effect.) This Act shall take effect ..... 1 .....

Note: In those states which have adopted the Uniform Joint Obligations Act, it is recommended that Section One of that Act be amended to read as follows:

"Section 1. In this Act, unless otherwise expressly stated,

2. obligation does not include a liability in tort; obligor does not
3. include a person liable for a tort; obligee does not inculde a
4. person having a right based on a tort. Several obligors means
5. obligors severally bound for the same performance."

APPENDIX II

Special Release Reserving Rights Where Law Provides for Contribution Between Joint Tort-Feasors:

FOR AND IN CONSIDERATION OF the payment to me/us of the sum of..... Dollars ($.....) and other good and valuable consideration, I/we, realizing that there is doubt and uncertainty as to the nature and extent of my/our injuries, losses and damages and as to the liability of the payors, hereinafter described, and that such facts are also in dispute, I/we, being of lawful age, have released and discharged, and by these presents do for myself/ourselves, my/our heirs, executors, administrators and assigns, release, acquit and forever discharge *..... and/or (his, her, their) master, servants, agents, and officers (any and all of whom are hereinafter referred to as the payors), their heirs, representatives, successors and assigns from any and all actions, causes of action, claims, demands, damages, costs, loss of services, expenses, compensation, and all consequential damage and also to the extent of their liability for contribution to other joint tort-feasors arising out of or in any way growing out of any and all known and unknown personal injuries and death or property damage resulting or to result from an accident that occurred on or about the ..... day of .....19....., at or near .....,

I/we reserve the right to make claim against any and every other person, and reserve also the right to make claim that they, and not said payors, are solely liable to me/us for my/our injuries, losses and damages.

In the event that other tort-feasors are responsible to me for damages as a result of this accident, the execution of this release shall operate as a satisfaction of my claim against such other parties to the extent of the relative pro rata share of common liability of the payors herein released.

If it should appear or be adjudicated in any suit, action or proceeding, however, that said payors and others were guilty of joint negligence which caused my/our injuries, losses or damages, in order to save said payors harmless, I/we, as further consideration for said payment, will satisfy any decree, judgment or award in which there is such finding or adjudication involving said payors on their behalf and to the extent of their liability for contribution, if it is held there is any liability for contribution, also, I/we will indemnify and save forever harmless said payors against loss or damage because of any and all further claims, demands, or actions made by others on account of or in any manner resulting from said injuries, losses and damages.

This special release contains the ENTIRE AGREEMENT between the parties hereto, and the terms of this release are contractual and not a mere recital.

I/we further state that I/we have carefully read the foregoing release and know the contents thereof, and I/we sign the same as my/our own free act.

WITNESS ..... hand and seal this ..... day of....., 19.....

CAUTION! READ BEFORE SIGNING

.....SEAL

.....SEAL

WITNESSES

.....)

Address.....)

.....)

Adress.....)

*Name here the known operator of the motor vehicle and/or all persons guilty as the tort-feasors intended to be released by this instrument.

FOOT NOTES

[1]*New York*

New York Stat. Sec. 211-A (passed L. 1928 Ch. 714) Fox vs. West, N. Y. Motor Iines, Inc.

Haines vs. Beru Eng. Const. Co. 230 App. Div. 332, 243 N.Y.S. 657.

Price vs. Ryan, 255 N.Y. 16, 173 N.E. 907.

Ackerson vs. Kibler, 249 N.Y. Supp. 629.

[2]*Georgia*

Ga. Code. (Michie, 1926) 4512-B.

McCalla vs. Shaw, 72 Ga. 458.

Cen. of Ga. Ry. Co. vs. Swift & Co. 28 Ga. App. 346, 98 S.E. 256.

Hay vs. Collins, 118 Ga. 243, 44 S.E. 1002.

Cox vs. Strickland, 120 Ga. 104, 47 S.E. 912.

Lee vs. Cen. of Ga. Ry. Co. 147 Ga. 428, 94 S.E. 558.

[3]*Kansas*

Kansas Rev. Stat. Ann. (1923) 60-3437.

Ft. Scott vs. K.C. Ft. Scott & M.R.R. Co. 66 Kans. 288, 72 Pac. 238.

[4]*Kentucky*

Laws of 1926, Sect. 484-A. provides: "contribution among wrong-doers may be enforced where the wrong is a mere act of negligence and involves no moral turpitude."

Consolidated Coach Corp. vs. Burge, 22 S.W. 110.

Blacker vs. Owenboro, 129 Ky. 75, 110 S.W. 369.

Central Passenger Ry. vs. Kuhn, 86 Ky. 578, 6 S.W. 441.

[5]*Louisiana*

Civil Code Art. 2103, 2324.

Aetna Life Ins. Co. vs. De Jean, et al (1935) 164 So. 331.

[6]*New Mexico*

New Mexico Stat. Ann (1929) Sec. 76-101.

[7]*Missouri*

Rev. Stat. of Mo. 1929, Sec. 3268.

Mo. Dist. Tel. Co. vs. S.W. Bell Tel. Co. et al 79 S.W. (2nd) 257.

Miller vs. United R. Co. (1911) 155 Mo. App. 528, (134 S.W. 1045).

Kenlock Tel. Co. vs. City of St. Louis, et al 268 Mo. 485, 188 S.W. 182.

Gerber vs. Kansas City, et al, 311 Mo. 49, 277 S.W. 562.

[8]*Virginia*

Virginia Code, Sec. 5579.

Hogan vs. Miller, 157 S.E. 540.

N.S. Ry. Co. vs. Gretakis, 162 Va. 597.

[9]*West Virginia*

W. Va. Code (1931) Ch. 55—A.7 Sec. 13.

Buskirk vs. Sanders, 73 S.E. 937.

Mier vs. Yoko, 171 S.E. 535.

[10]*Minnesota*

Arkeng vs. Moffett, 37 Minn. 109, 33 N.W. 320.

Underwriters of Lloyds of Minnesota vs. Smith 166 Minn. 388, 208 N.W. 13 (1926).

Mayberry vs. Nor Pacific Ry. 100 Minn. 79, 110 N.W. 356 (1907).

Fidelity & Cas Co. vs. Christenson, 183 Minn. 182, 236 N.W. 618 (1931).

[11]*Pennsylvania*

Goldman vs. Mitchell-Fletcher Co. 292 Pa. 354, 141 Atl. 231 (1928).

Winnacombe vs. Phila. 297 Pa. 564, 147 Atl. 826.

Gossard vs. Gossard, 319 Pa. 129, 178 Atl. 837.

[12]*Rhode Island*

[13]*Arkansas*

Act 315 of 1941, Arkansas.

[14]*Maryland**

Md. Ann. Code (Bagby Supp. 1929).

Art. 50, Sec. 12-A.

Lanasa vs. Beggs, 159 Md. 311.

Transit Co. vs. Metz, 158 Md. 424.

*Get recent citation of uniform statute.

[15]*Wisconsin*

Estate of Koch, 148 Wis. 548, 134 N.W. 663.

Elle's vs. C. & N.W.Ry. Co. 167 Wis. 392, 167 N.W. 1048 (1918).

Bakula vs. Schwab, 167 Wis. 546, 168 N.W. 378 (1918).

Fisber vs. TMER & L Co., 173 Wis. 546, 180 N.W. 269.

Waite vs. Pierce, 191 Wis. 202, 209 N.W. 475 (1926) and 210 N.W. 822.

Wligick vs. Globe Rutgers Co. 189 Wis. ,366, 207 N.W. 710.

Scharine vs. Helebsch, 203 Wis. 261, 234 N.W. 358.

Grant vs. Asmuth, 195 Wis. 458, 218 N.W. 834.

Frankford Ins. Co. vs. Mil. E. R. & L. Co. 169 Wis. 533, 173 N.W. 307.

Michael vs. McKenna, 199 Wis. 608, 227 N.W. 396.

Brown vs. Haertel, 210 Wis. 354, 244 N.W. 633.

Roeber vs. Panal, 200 Wis. 420, 228 N.W. 512.

Poneitowockio Harris, 200 Wis. 504, 228 N.W. 126.

Zutter vs. O'Connell, 200 Wis. 601, 229 N.W. 74.

Wick vs. Wick, 192 Wis. 260, 212 N.W. 784.

Buggs vs. Wolff, 201 Wis. 533, 230 N.W. 621.

Haines vs. Daffy, 240 Wis. 152.

Van Glider vs. Gugel, 220 Wis. 612, 265 N.W. 706.

Western Cas. & Inv. Co. vs. Milwaukee G & C Co. 213 Wis. 302, 251 N.W. 491.

See: "A problem in contribution: The tort-feasor with an individual defense against the injured party by Arthur Larson." Wisconsin Law Review, July 1940.

[16]*North Carolina*

N. Car. Code 1935 (Michie) Sec. 618. Gregg vs. Wilmington, 155 N. C. 18, 70 S.E. 1070.

Fowle vs. McLean, 168 N.C. 537, 84 S.E. 852.

Bank vs. Sprinkle, 180 N.C. 580, 104 S.E. 447.

Linebagee vs. Gastonia, 196 N.C. 445, 146 S.E. 79.

Bargeon vs. Transpr. Co. 196 N.C. 776, 147 S.E. 299.

Jones vs. Rhea, 198 N.C. 190, 151 S.E. 255.

Gaffney vs. Phelps, 207 N.C. 553, 178 S.E. 231.

[17]*Texas*

Texas Rev. Civ. Stat. (1925) Art. 2212.

Note: Copy Pg. 18—Cases.

Citation on bottom page 8—"Wisconsin allows contribution even though tort-feasor settles."

[18]Western Casualty & Surety Co. vs. Milwaukee Const. Co. et al, 251 N.W. 491 (1933).